No. 504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STEELWORKERS OF AMERICA,

Petitioner

v.

UNITED STATES OF AMERICA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

ARTHUR J. GOLDBERG
DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
BERNARD DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.
Attorneys for Petitioner
United Steelworkers of America

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OPINIONS BELOW

The District Court for the Western District of Pennsylvania issued only findings of fact and conclusions of law, which appear in the Record at pp. 244-48. The opinion of the Court of Appeals, which appears in the Record at pp. 286-310, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1959. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1254(1) and Section 208(c) of the Labor Management Relations Act, 29 U.S.C. §178(c).

QUESTIONS PRESENTED

1. Whether, within the meaning of Section 208(a) ii , Title II, Labor Management Relations Act, 1947, detriment to economic well-being is comprehended within the statuto term "national health or safety."

2. Whether, within the meaning of Section 208(a), Title II, Labor Management Relations Act, 1947, peril to the "national . . . safety" which emanates from a shutdown of an insubstantial part of an industry suffices to confer jurisdiction upon the District Court to enjoin a strike of the entire industry.

3. (a) Whether the courts below applied the proper standard of proof for a finding that continuance of the steel strike will imperil the national health and safety.

(b) Whether, on any standards, the findings of the courts below can be sustained.

4. (a) Whether under the terms of Section 208 a , Title II, Labor Management Relations Act, 1947, the District Court has equitable discretion to determine whether to grant or deny an injunction;

(b) Whether the Court of Appeals can sustain the issuance of the injunction as an allowable exercise of discretion when the District Court exercised no discretion;

(c) Whether, assuming that the District Court did exercise its discretion, its action in enjoining this strike constituted an abuse of that discretion.

5. Whether the functions conferred upon the District Court by Section 208(a), Title II, Labor Management Relations Act, 1947, call for the exercise of nonjudicial powers in contravention of Article III, Section 2, of the United States Constitution or the doctrine of separation of powers.

STATUTE INVOLVED

Sections 206-210 of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 176-180, 61 Stat. 155, provide, in part, as follows:

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

* * * *

SEC. 208 (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever hap-

pens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

STATEMENT OF THE CASE

The petitioner, United Steelworkers of America, one of the defendants below, is a labor organization which is the certified or recognized collective bargaining representative of some or all of the nonsupervisory employees of each of the other named defendants in this case. These defendants are employers who operate mines, plants, ships, and other facilities relating to the production and fabrication of steel, and represent a substantial part — but not all — of an industry engaged in commerce, and the production of goods for commerce, among the several states and with foreign nations.

Prior to June 30, 1959, there were in effect between the Union and the employer defendants — as well as almost all other employers in the industry — collective bargaining agreements prescribing wages, hours, and other terms and conditions of employment, which agreements, by their terms, were to expire on June 30. (R. 12)

Early in May, the "key" negotiations for agreements began between the representatives of the Union and representatives of twelve of the largest employers. The companies first proposed to extend the contracts due to expire June 30 for one year, with the deletion of the existing provision for adjusting wage rates for changes in the cost of living. (R. 12) The union presented a great number of proposals, some of which necessarily varied as between

companies because of the differences in the individual company contracts. (R. 23) The basic economic issues, however, were substantially the same at each company. In June, the twelve companies proposed their own set of non-economic contract changes (R. 16) which again necessarily varied as between companies. No agreement was reached.

Shortly before the June 30th deadline, the parties, at the request of the President of the United States, agreed to extend the old agreements for two weeks. (R. 12) At the end of that period there was no settlement, and a strike of the more than 500,000 steelworkers began. Negotiations, with only short interruptions, have continued during the strike, and even during the course of this litigation. A settlement with one of the twelve largest companies, Kaiser Steel Corporation, was made on October 26, 1959. (R. 319)

A summary of the negotiations up to October 19 and the issues in dispute between the parties appears in the Report to the President of the Board of Inquiry, at pp. 11-33 of the record, and in the statement of President David J. McDonald to that Board, which is attached to Mr. McDonald's affidavit in this case and is part of the record herein. (R. 42-51)

In the opinion of Mr. McDonald, which appears in his sworn affidavit and which is uncontradicted in the record, the industry has steadfastly refused to settle the dispute on any reasonable terms because it anticipated the use by the Government of the Taft-Hartley emergency procedures to break the strike. (R. 40-41) Some of the differences in the issues in dispute as between different companies and units are indicated at pp. 17, 21-23 of the record.

On October 9, 1959, the President of the United States took the first step under the Taft-Hartley emergency procedures. He issued Executive Order 10843 (R. 9), appointing a Board of Inquiry, pursuant to Section 206 of the

Labor Management Relations Act. In this order, the President expressed the "opinion"—which, under the statute, he must do before acting under the emergency provisions—that the strike, if permitted to continue, would imperil the national health and safety. On October 14, the President, in Executive Order 10848 (R. 11), extended to October 19 the date upon which the Board was to report to him.

The Board submitted its report (R. 11-33) on the date it was due. This report, in accordance with the statute, dealt only with the collective bargaining issues in dispute between the parties. It made no finding or recommendation concerning the presence or absence of a threat to the national health or safety.

On receiving the report, the President directed the Attorney General to petition any district court having jurisdiction of the parties to enjoin the continuance of the strike and to order such other relief as might be necessary or appropriate. (R. 8)

On October 20 the present action was filed in the United States District Court for the Western District of Pennsylvania. (R. 1) By stipulation, all defendants waived service of process and submitted to the jurisdiction of the Court. They also stipulated that the case be determined on the basis of affidavits rather than oral testimony, and that it be submitted to the court upon final hearing. (R. 34)

At the trial, the following basic facts were found or undisputed. The strike had shut down approximately 85 percent of the steel producing capacity of the United States. (R. 244) The remaining 15 percent was still operating, either under extension agreements between the Union and the employers involved, or, in a few instances, because the employees involved are not organized or are represented by some other union (R. 98-102). Subsequent to the trial of this case, one of the struck companies who was a defendant below, Kaiser Steel Corporation, signed an agreement with the Union, settling the strike at that company. Conse-

quently, an additional 2 percent of the steel industry is now operating, and 83 percent is presently affected by the strike. By stipulation, the proceedings as to Kaiser Steel Corporation have been ordered to be dismissed. (R. 322)

Steel production prior to the strike was abnormally high in anticipation of the strike, and for the first nine months of 1959 total production was approximately 72.4 million ingot tons, as compared with a total of 85.2 million tons for the entire year 1958. (R. 103)

A large part of the Government's case was based on the allegation that the strike was affecting the economic well-being of the nation. The evidence with respect to this issue showed that as of the time of the hearing, unemployment attributable to the strike was 265,000, not counting strikers, and 765,000 including strikers (R. 246). It was found by the district court that if the strike were to continue through the balance of 1959 another 2½ months, strike-caused unemployment (apparently including strikers) would reach 3 million. (R. 246) Thus, assuming that finding to be correct, unemployment would be increased by approximately 2¼ million if the strike were to continue through December. Since total unemployment at the time of the hearing from all causes was slightly over 3 million (R. 103), total unemployment at the end of December would reach 5¼ million. In 1958, however, without any major strike, unemployment reached a peak of 5.4 million. (R. 108) There is no finding, and no evidence on the record which would support a finding, that the strike would last through December if the injunction were denied. But even if the strike should last that long, the findings indicate that the economy would not be affected as seriously as it was affected by the 1958 recession.

A considerable amount of evidence was presented concerning the effect of the strike on the national defense program. It was undisputed, however, that the total amount of steel consumed for defense purposes during the 18

months prior to the strike was never more than 1.2 percent of total production—which, in terms of tonnage, is approximately 5 percent of the capacity still in operation despite the strike. (R. 91) The court found that despite the fact that steel was still being produced at a rate many times as great as the rate at which the defense program consumes steel, certain steel products needed in connection with some aspects of the defense program were nevertheless presently unavailable because of the steel strike. (R. 246-47) The Union contended below—and will contend in this Court—that this finding was not supported by the evidence, but even if the finding be accepted as true, it means only that a very tiny fraction of the plants now on strike are necessary for the defense program.

On these facts, the District Court made the conclusory finding that the strike imperiled the national health and safety (R. 247), and issued an injunction. (R. 249-50) The court rejected the union's argument that the statute is unconstitutional because it authorizes the court to issue an injunction which does not enforce a pre-existing legal obligation, but merely creates such an obligation. The court did not pass on the Union's further argument that it should, in the exercise of its equitable discretion, refuse to issue an injunction in this case.

The union promptly filed an appeal (R. 251) and moved the district court for a brief stay to enable the Union to apply to Judge Staley of the Court of Appeals for the Third Circuit for a stay pending appeal. This was granted. (R. 253) Shortly thereafter, Judge Staley, on motion by the Union, granted a stay until 10 A.M. the following morning, or, if the union had by that time filed a motion before the Circuit Court, until further order of the Court. (R. 266)

On October 22, at 10 A.M., the parties appeared before the Third Circuit Court of Appeals in Philadelphia, on the Union's application for a further stay (R. 267) and appli-

cation for advancement of consideration of the appeal (R. 278). Chief Judge Biggs, and Judges Goodrich and Hastie comprised the court. At the suggestion of the court and with the agreement of the parties the appeal was heard on the merits at that time. The court continued the stay in effect, except as to paragraph 5 of the injunction, which directs the parties to bargain collectively and to attempt to settle their differences. (R. 282)

On October 27, the Court of Appeals issued a decision affirming the judgment of the district court, Judge Hastie dissenting. At the same time it issued a *per curiam* opinion (R. 318) which set forth the views of the other members of the court with respect to rehearing. Judges McLaughlin and Staley voted for rehearing. Judge Forman voted against. Judge Kalodner disqualified himself. The result was an equally divided court and no rehearing. On its own motion, the court continued the stay in effect until November 2, to permit aggrieved parties to petition for certiorari. (R. 318)

The opinion of the Court of Appeals began with a consideration of the constitutionality of the statute. Referring to the statement of purposes in section 1(b) of the Labor Management Relations Act, 29 U.S.C. § 141(b), the court concluded that one of the purposes of the act was "to bring an end to industrial strife which affects commerce to such a degree as to menace the general welfare." (R. 292) Thus, the court said, it is "tortious" to permit "a labor dispute to continue to the point where national health or safety is imperiled." (R. 292) The national emergency injunction, the court reasoned, is simply the method provided by the statute for remedying the "tort."

The court apparently relied as well on a somewhat different theory to sustain the constitutionality of these provisions. These sections, the court held, have to a limited extent revived the old "labor injunction" which the Norris-LaGuardia Act had destroyed. While the court considered

such an injunction, compelling employees to return to work, a form of "status judgment," it held that the entry of such a judgment is within the constitutional power of an Article III court, just as the review of administrative decisions is part of the judicial power. (R. 295)

Finally, the court held that the determinations which the statute requires a court to make before issuing an injunction is "specific enough and factual enough to bring the inquiry within the area of judicial decision as distinguished from legislative judgment." (R. 296)

The court then turned to the findings of fact made by the district court. It rejected the Union's argument that to justify the injunction the peril to the national health and safety must be present or imminent, stating that "the words of the Section speak to the future, *viz.*: 'If [the strike is] permitted * * * to continue [it] will imperil the national health or safety.'" (R. 300)

Relying on the affidavit of Dr. Raymond Saulnier, the court concluded that the effect of the strike on the defense program could not be remedied by opening a few plants, because the "steel industry is too vast and too complicated to be segmented so as to make such a desirable result practicable." (R. 300)

The court held that the affidavits submitted by the Government adequately supported the findings of the court below. Since the Government's witnesses were all cabinet officers or department heads, the court held that they were qualified to testify as experts and that their testimony was entitled to be weighed "in a different light from that of a witness who testifies that a motor car was or was not on a portion of the highway where it did not lawfully belong." (R. 301)

The difference between the affidavits submitted by the Union and those introduced by the Government, said the court, was largely a difference as to "avenues of approach. We find no variances in the affidavits basically material to

the findings made by the court below or to the issues with which we are immediately concerned." (R. 306)

Finally, the majority opinion considered the Union's argument that the injunction should have been refused in the exercise of equitable discretion, in order to facilitate a prompt settlement of the labor dispute in the public interest. The court conceded that a court of equity "of necessity must weigh" the fact that less drastic remedies were available to the Government, but held that "the danger is great enough and calls for a remedy as sweeping as the law will permit." (R. 308) Further, the court stated that one of the purposes of the emergency procedures is to set in motion certain administrative machinery—the Board of Inquiry, the last-offer ballot, etc.—designed to help settle the dispute, and that this machinery would not be available without the injunction. The court seemed to say that it would have affirmed a decision withholding the injunction as a matter of discretion, but that "we cannot say that in issuing the injunction the trial court abused its sound legal discretion." (R. 310)

Judge Hastie dissented. In his view, the primary purpose of the Taft-Hartley injunction "is not to force strikers to return to work but to facilitate a settlement of a serious industry-wide strike by collective bargaining," (R. 310-11) and that in this case, at least, the injunction would make a settlement more difficult. He therefore concluded that the district court should have denied the injunction as a matter of sound discretion.

In Judge Hastie's opinion, the Government had other adequate statutory powers to assure the continued production of goods needed for defense, with or without a strike, and that "it is reasonable to believe that some different purpose motivated the Congress in authorizing temporary injunctions under the Taft-Hartley law." (R. 312)

Neither the Government nor the industry had "shed any light on this critical question" of whether an injunction

would help or hinder a settlement, said Judge Hastie. "There is no suggestion that any tension or hostility would be relieved or any impediment to settlement removed by a suspension of the strike." (R. 313-14) The only evidence is the affidavit of David J. McDonald, and the attached public statements of George W. Taylor, Nathan P. Feinsinger, and W. Willard Wirtz, all of which tended to prove that a settlement could be negotiated if the injunction were denied.

Judge Hastie disagreed with the majority's view that an injunction against the strike was necessary to put the administrative machinery contemplated by the emergency provisions into operation. He interpreted the statute as permitting the court to order the parties to follow the procedures provided in the statute without at the same time terminating the strike. He pointed out that the court had, in effect, done so when it permitted paragraph 5 of the injunction to take effect while staying the other parts of the order. "This much and no more," he concluded, is "an appropriate exercise of equitable judgment and discretion in the circumstances of this case." (R. 317)

SUMARY OF ARGUMENT

I. The District Court had jurisdiction to issue an injunction in this case under Section 208 of the Act only if it properly found that the strike, if not enjoined, would imperil the national health or safety. The findings of the Court that peril to health and safety existed were based on a misreading of the statute and, even on that misreading, were unsupported by the evidence.

The District Court based its finding of peril to national health on the assumption that the term included economic well-being. But the language of the statute, as well as its legislative history, confirm the view that the term health was meant in its normal sense of physical health. To enlarge it to include economic well-being is to give the courts

a roving commission to determine impact on the general welfare. And this expanded version of health is an entirely new conception of the scope of the statute, as the Government has itself conceded.

The District Court based its finding of peril to safety upon an asserted shortage of special steel for certain defense needs. But it is incontrovertible that any shortage, if shortage there be, stems from a shutdown of a minute fraction of the industry, not a substantial part of it. There is no warrant for reading the statute as permitting an injunction against a strike in an entire industry on that basis. Section 208(a) requires a finding both that a strike affects an entire industry or a substantial part thereof *and* a finding that the strike, if permitted to occur or continue, will imperil the national health or safety. While it is possible to read the statutory language as if these two requirements were entirely unconnected, this would plainly do violence to the legislative intention. Congress did not permit an injunction to be issued against a strike in only a small part of an industry, even though that strike imperiled the national safety. It is inconceivable that it intended, therefore, that a peril of the same magnitude should be comprehended within the statute because it occurs as a small part of an industry-wide strike.

Even if the term "health" is enlarged to include economic health, and an injunction against an entire industry is authorized because of defense needs for the products of a tiny fraction of it, still the findings of the District Court cannot be supported. They are based entirely on affidavits which are conclusory in nature and unsupported by sufficient particularization of the subsidiary data necessary to justify and evaluate the conclusion. The findings are not based on evidence but upon an uncritical echoing of executive opinion.

II. The statute does not make the issuance of an injunction mandatory. The language of Section 208 it-

self is permissive only and contrasts strongly with the mandatory language in Section 210. Even were the language ambiguous, it should be construed in accordance with the tradition of equity practice as vesting discretion in the trial court.

The existence of discretion in the trial court was recognized by the Government in the American Locomotive case, *United States* v. *United Steelworkers*, 202 F. 2d 132 (2d Cir. 1953), although its brief in opposition in this Court seems to argue to the contrary. The Court of Appeals unanimously concurred in the view heretofore taken by the Government.

The trial court did not, in fact, attempt to consider the factors bearing on the proper exercise of its discretion but operated on the assumption that an injunction was mandatory if the judicial requirements set forth in the statute were satisfied. It ignored the argument of the union that the court had discretionary powers and overruled the conclusion of law proposed by the union to that effect. The failure of the district court even to inquire into the matters relevant to the proper exercise of its discretion was plain error since there were presented to it alternatives which it clearly should have considered and which it did not.

The Court of Appeals found that the court below, in the exercise of its sound legal discretion, might have decided either way on the question of whether an injunction should issue. It affirmed, however, on the theory that the action of the district court was within the permissible area of its discretion. In doing so, it clearly erred since the district court simply did not consider the case in terms of exercising equitable discretion.

The only basis on which the action of the trial court can be sustained here is that any action other than the one taken by it would have been an abuse of discretion. No such contention can, however, properly be made since

there are a number of factors which, had they been considered by the trial court, could have justified action other than the one which it took.

The first consideration is the one set forth in the dissenting opinion of Judge Hastie below—the fact that the refusal to enjoin the strike would, on the record made here, permanently terminate the assumed peril to the national safety, while the issuance of an injunction would not do so. The majority of the Court of Appeals expressly concurred in the view that such a determination would have been within the sound discretion of the trial court.

The second consideration bearing on the exercise of equitable discretion is the availability of other, and less drastic, methods, for obtaining the minute quantity of steel necessary for the national defense which was claimed by the Government not to be available from the plants now operating.

The final consideration which would have justified a differen result than the one to which the trial court came is the fact that an order directed to the particular producers of the specialty steels claimed to be required for the national defense would have met any peril to the national safety. Indeed, the availability of this much more limited remedy supports an argument that it would have been an abuse of discretion for the trial court to enter the broad order which it did in the light of the limited nature of the defense requirements. The view of the Court of Appeals that an injunction against the strike was necessary to trigger the administrative machinery provided for in Sections 209-210, even if correct, would be met by an injunctive order terminating the strike only at the plants necessary for the national defense.

III. Section 208 of the Taft-Hartley Act attempts to impose upon the federal courts duties which are not part of the judicial function of adjudicating justiciable con-

troversies. The structure and language of Sections 206-210 of the Act, and the relevant legislative history, make it clear that Congress specifically intended to repose in the federal courts, rather than in an administrative or executive agency, the function of ordering a strike to be broken, without creating any duty to terminate the strike. This was done deliberately. Congress did not want to provide a duty to postpone or interrupt a strike with which a union could comply without being enjoined. Nor did it wish to vest in any agency other than a court the function of directing that a strike be terminated. It specifically wanted a strike enjoined, despite the fact that the procedures it provided for the settlement of the labor dispute were exclusively administrative in character.

To thrust this function upon the federal courts constitutes a violation of Article III of the Constitution and of the doctrine of the separation of powers. There clearly are no rights or duties to be adjudicated in a proceeding under Section 208. Unlike statutes in which a duty can be implied from the statutory provision of a remedy, there is in this statute no obligation which a union can satisfy to avoid being enjoined. This demonstrates that the function given to the court by the statute is not the judicial one of adjudicating controversies but the executive or legislative function of creating a duty.

The Government argues that a statute would be valid if it provided that the President should first order the strikers back to work and then seek judicial enforcement of that order, and that the difference between such a statute and Sections 206-210 is merely a form of words. This argument, however, serves to underline the unconstitutional function given to the judiciary under the Act. It is hardly an answer to the claim that the statute vests an executive or legislative function in the judiciary to argue that the statute would be constitutional if that function had been vested in the executive. And the difference is a very real

one. If the obligation to terminate a strike is to be imposed in a particular case it should be the executive, or an administrative body, which imposes that duty, not a federal court.

Congressional committees have subsequently recognized the very real difference between a cooling-off period ordered by the President and one ordered by the courts through th injunctive process. The attempts in 1949 to meet the problem by amending the statute failed of passage.

The argument of the Court of Appeals that Congress merely reinstated the traditional labor injunction which was historically a "status" judgment is plainly erroneous. The labor injunction, even under the *Debs* case, always purported to rectify wrongs and violations of pre-existing rights. It did not declare status. The function given the district courts under Section 208 can, indeed, be analogized to the functions given such bodies as the National Labor Relations Board, as the court below did. But the functions given such administrative bodies cannot constitutionally be vested in Article III courts.

IV. The non-judicial nature of the function vested in the district courts by Sec. 208 finds its necessary reflection in the nature of the findings which the court must make, the kind of order it must issue and the procedure which must be followed. The findings are simply not judicial in nature since they must inevitably be based upon considerations not susceptible of judicial determination. In making its order the court must consider matters which are properly the subject for an economist or an arbitrator of contract terms. And the procedure which necessarily must be followed in attempting to impose on the courts the duty of making an executive or legislative decision does violence to every tradition of the judicial system.

ARGUMENT

I. THE FINDINGS OF THE DISTRICT COURT AS TO NATIONAL HEALTH AND SAFETY WERE BASED ON AN ERRONEOUS READING OF THE STATUTE AND WERE UNSUPPORTED BY THE EVIDENCE

Acquisition of jurisdiction by the District Court in this case, and its issuance of an injunction, were based upon two determinations made by it: (1) "national health" will be imperiled because the steel strike will idle workers and facilities dependent upon steel (R. 245-246; 247); (2) "national safety" will be imperiled because the shortage of certain steels affects the progress of certain defense activities (R. 246-247).

Each determination is based on a serious misreading of the statute. We shall show that detriment to economic well-being is not relevant to "health" in the statutory sense. We shall also show that peril to safety, if any there be, stems from a shutdown of a minute part of the industry, and this does not suffice to confer jurisdiction upon the District Court to enjoin a strike in the entire industry. We shall finally show that, even on the Government's version of the scope of the statute, there is no peril to national health or safety.

A. *Detriment to Economic Well-being Is Not Relevant to Health*

The District Court here concluded that "The national health will be imperiled if the strike is permitted to continue" (R. 247). This conclusion rests exclusively upon its subsidiary prediction that (*ibid.*):

> A continuation of the strike will have the ultimate effect of adversely affecting millions of small business enterprises, almost all of which are directly or indirectly dependent upon steel products and most of which

> lack the resources to stock large inventories. In addition, it will have the effect of idling millions of workers and a large proportion of the facilities in industries dependent upon steel for their continued operation. Manufacturing industries directly dependent on steel mill products account for the employment of approximately 6,000,000 workers and normal annual wages and salaries totalling approximately $34,000,000,000. The products of these industries are valued at over $125,000,000,000. The national health will be imperiled if the strike is permitted to continue.

This conclusion is obviously unrelated to "health" in the conventional sense of food shortages, impairment of hospital or medical care, lack of heating and sanitation, or the like. Nor is there anything in the record which bears at all on physical health. And it is singularly revealing that there is no affidavit from the Secretary of Health, Education and Welfare.

The conception of health embraced by the District Court and undisturbed by the Court of Appeals, is rooted instead in the view that the statutory term "health" embraces economic well-being. This is explicit in the opinion expressed by the President and in the affidavits of his subordinates. In convening a Board of Inquiry the President stated that "if production is not quickly resumed, severe effects upon the economy will endanger the *economic* health of the nation" (R. 10, emphasis supplied). The Secretary of Labor expressed his opinion that the "*economic* health of the nation is being endangered" (R. 173, emphasis supplied) and the Administrator of the Small Business Administration was similarly of the view that "the strike will seriously endanger the *economic* health of the nation . . ." (R. 184, emphasis supplied).

To expand the concept of "health" from physical to economic well-being departs from the ordinary meaning of the

word. And it is demonstrable that Congress used the word in its conventional sense.

The Senate bill, as reported and passed, was confined to peril to the "national health or safety."[1] The House bill, as reported and passed, extended to peril to "the public health, safety, *or interest*".[2] The Senate version prevailed in conference.[3] The rejection of the view that the statute should extend to national "interest" is emphasized by the colloquy on the floor of the House between Congressmen Kennedy and Owens (93 Cong. Rec. 3513, in 1 Leg. Hist. 669):

> "MR. KENNEDY. I believe that this country should certainly be in a position to combat a strike that affects the health and safety of the people. Therefore, I feel that the President must have the power to step in and stop those strikes. I am not in the position of opposing everything in this bill, but there are certain things in the bill that are wrong. I do not see how the President is going to have the power to stop strikes that will affect the health and safety of the people under the procedure listed in section 203. I think he must have that power.
>
> "I agree with you that any bill providing for an injunction should carefully consider the position of the striking union and make sure that their rights are protected. I think that in those cases Federal seizure until the dispute is settled would, perhaps equalize the burden in the fairest possible manner."

[1] S. 1126 (as reported), 80th Cong., 1st Sess. §§ 206, 209(a) (1 *Leg. Hist.* 146, 148); H.R. 3020 (as passed in Senate), 80th Cong., 1st Sess., §§ 206, 209(a) (1 *Leg. Hist.* 274, 276). "Leg. Hist." refers to the two volume edition of the *Legislative History of the Labor-Management Relations Act, 1947* (Govt. Print. Off., 1948).

[2] H.R. 3020 (as reported), 80th Cong., 1st Sess., § 203(a) (1 *Leg. Hist.*, 87-88); H.R. 3020 (as passed in House), 80th Cong., 1st Sess., § 203(a) (1 *Leg. Hist.*, 214-215).

[3] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 64, in 1 *Leg. Hist.* 568.

"MR. OWENS. Will not the gentleman admit that we have a third word in there? It is 'interest.' Could we not better use the word 'welfare' instead of 'interest,' because the word 'welfare' occurs in the Constitution? It is just as broad as the word 'interest' and more practical.

"MR. KENNEDY. The proposal embraces two separate things, health and safety. Because the remedy is drastic these two, in my opinion, are sufficient. I believe we should apply this remedy when the strike affects health or safety, but not the welfare and interest, which may mean anything. I would not interfere in an automobile strike, because while perhaps that affects national interest, it does not affect health and safety.

"MR. OWENS. Does not the gentleman agree that 'welfare' is the stronger and in line with the President's idea?

"MR. KENNEDY. No. Both 'welfare' and 'interest' are too indefinite. They could cover anything. I would not have the law apply except in cases where the strike affected health and safety."

The Government contends that emphasis upon the omission of the word "interest" from the Senate bill overlooks another difference between the House and Senate bills which argues against a narrow reading (Govt. br. p. 48, n. 26, 2d Par.). The House bill, the argument runs, was limited to "transportation, public utility or communication services," while the Senate bill applied to any industry engaged in trade or the production of goods for commerce. This expanded coverage, it is urged, is "hardly consistent" with a reading of "national health or safety" to exclude the concept of "interest." But expansion in coverage is itself a decisive reason in favor of a cabined view of the type of impact that would be within the statute's reach. For, so long as the statute's scope was limited to the three

enumerated industries, it would only be within that confined compass that impact in terms of "health, safety, or interest" would be measured. But once the area of coverage was widened to include "an entire industry or a substantial part thereof" in any field, it was no longer feasible to retain an equally wide view of the scope of the impact which the statute would embrace. For the combination of a wide area of coverage and a wide scope of impact would place the District Court in the role of overseer of the national economy. Congress was not ready to put the district courts in that business.[4] As Senator Taft emphasized in explaining the measure, in addition to the requirement of a strike "affecting substantially an entire industry," there is "the additional requirement that such strike imperil the national health or safety, *a condition which, it is anticipated, will not often occur.*" 93 Cong. Rec. 6860 (in 2 *Leg. Hist.* 1625) (Emphasis added.)

[4] The Government would buttress its view by pointing to the policy statement which introduces the whole of the Labor Management Relations Act, 1947, and which reads in part that "neither party has any right in its relations with any other to engage in acts or practices which jeopardize the *public health, safety or interest.*" (Govt. br. p. 47, n. 26, emphasis supplied.) The use of the word "interest" in a policy statement which covers five titles of a statute, of which the presently relevant sections 206-210 are a small part, is hardly a basis for expanding that small part, particularly since the word "interest" is a perfectly apt generality by which to describe the policy underlying provisions other than sections 206-210. Thus, if anything, the omission of the word "interest" from sections 206-210 implies that those sections were deliberately designed to be narrower in scope.

It is also interesting to note that the policy statement refers to "public health." According to the Government, the adjective "public" is the appropriate way to confine the term "health" to "*physical* health" (Govt. br. p. 47). Since the Government states that the meaning of the substantive provision is to be read in the light of the policy statement, and since the policy statement according to the Government's understanding of the use of terms is limited to physical health, it follows on the Government's own argument that the term "health" in sections 206-210 is confined to physical health.

To adopt the Government's freewheeling concept of peril to the general welfare is also to revive the full vigor and egregiousness of the labor injunction as it existed in the days before the Norris-La Guardia Act and as it is epitomized by *In re Debs,* 158 U. S. 564, 584. This is indeed the Government's avowed aim (Govt. br. pp. 28-29, 37). But it is hardly an aim which can be attributed to Congress. "It would mean that, in order to protect the public interest, . . . a court could, at the behest of the Attorney General of the United States, issue an injunction as courts did when they issued the *Debs,* the *Hayes* and the *Railway Shopmen's* injunctions. But it was these very injunctions, secured by the Attorney General of the United States under claim of compelling public emergency, that gave the most powerful momentum to the enactment of the Norris-La Guardia Act. This history is too familiar to be rehearsed." Mr. Justice Frankfurter in *United States* v. *United Mine Workers,* 330 U. S. 258, 315.

It would be no answer were the Government to say that Congress has expressly lifted the limitations of the Norris-La Guardia Act for the purpose of sections 206-210. The question is the extent to which the restrictions have been removed. To claim that peril to the general welfare is now the criterion is to say that Congress abandoned all substantive limitations. The memory of the abuse was still too searing in 1947 to suppose that a short fifteen years after its enactment in 1932 Congress had forgotten so much of the history which preceded the Norris-La Guardia Act as to resurrect one of the foremost evils which led up to it.

Nor would it be an answer were the Government to say that the safeguard that Congress preserved was to limit the injunction to 80 days. An 80 days injunction in a labor dispute is ordinarily for all practical purposes a permanent injunction in relation to the dispute to which it is applied.

Although made to support its conclusion that the statute

was constitutional, the observation of the Court of Appeals is particularly pertinent on the question of statutory construction. "[C]ontrasting the statute as enacted with the House proposal which was rejected," the Court of Appeals stated that (R. 295-296): "The House would have called upon a district court to act whenever in its judgment the public interest was imperiled. This would have left the court at large in deciding the expediency of action guided only by statesmanlike conception of the public welfare. But, as enacted, the statute requires decision whether the evidence adduced in a case shows serious interference with essential national defense activities or threatened impairment of public health." Congress did not, as the Government would have it, give the District Court a roving commission to determine impact on general welfare.

The reading which we urge is supported, finally, by the fact that the industry which was most in the Congressional mind and which alone was cited in the committee report on the Senate bill, was coal. S. Rept. 105, 80th Cong., 1st Sess. p. 14. And the coal industry is one which the statutory description, as we read it, fits like a glove. The effect of a cessation of coal production is primarily related to physical, rather than economic, health and safety. See Appendix C.

To expand the scope of the statute to include economic well-being is also an entirely new conception. As the Government conceded on argument below, "in all of the [fourteen] prior cases under Taft-Hartley, the Government proceeded on the single-barrel basis of the effects upon critical items needed for defense. In this case we are proceeding also on the other basis, the effect on the national economy, as well" (Transcript of oral argument in the Court of Appeals, p. 105). This new basis is premised on a misreading of the statute, and the finding of peril to health, which is based on that same misreading, clearly does not meet the statutory prescription.

B—*Peril to National Safety Which Emanates From a Shutdown of an Insubstantial Part of an Industry Does Not Suffice to Confer Jurisdiction Upon the District Court to Enjoin a Strike of the Entire Industry.*

The District Court found peril to the "national safety" based on its determination that a shortage of certain steels existed and this shortage adversely affected the progress of certain defense activities (R. 246-247). We do not, of course, contest the proposition that defense needs are pertinent to a determination of peril to national safety. But, in this case, any peril to national safety, assuming for the moment that one was properly proved to exist here (see part C below), arises from a shutdown of a tiny fraction of an industry. Such a shutdown does not suffice to confer jurisdiction upon a District Court to enjoin a strike in the entire industry. Any other view requires the conclusion that a danger created by a strike of 5,000 employees empowers a district court to require 500,000 to return to work.

It is uncontroverted in the record that 63 steel mills throughout the country are still in operation, unaffected by the strike, and account for 15.36 percent of the total steelmaking capacity in the United States (R. 99-102). To this should be added the two percent steelmaking capacity of the plant of the Kaiser Steel Corporation which has been reactivated as a result of the settlement reached between the Union and the Company. It is also uncontroverted that steel requirements for all defense purposes constitute a minute fraction of steel produced. Thus, in no quarter since 1958 have mill shipments for defense purposes exceeded 1.2 percent of total mill shipments; for the entire year and a half ending mid-1959, shipments for defense purposes accounted for less than one percent of total shipments (R. 91). This quantity is less than five percent of the productive capacity of the steel mills currently in operation; in the aggregate, the current level of steel output is some twenty times as large as defense requirements. *Ibid.*

The District Court found that "Certain items of steel required in top priority military missile programs are not made by any mill now operating, nor available from any inventory or from imports" (R. 246). This finding repeats in so many words the unparticularized statement in the affidavit of the Secretary of Commerce (R. 162). Neither that affidavit, nor any other, specifies the type or quantity of such steel, the closed plants at which they are produced, or the number of such plants which would have to be reactivated to fill the need. Industry and governmental sources, of which this Court may take judicial notice, show that virtually every type of specialty steel necessary for defense purposes is or can be produced by nonstruck mills, and that the nonstruck mills, although accounting for 15.36 percent of the total steelmaking capacity, actually account for 35.04 percent of electric steel furnace capacity. Almost all high quality alloy steels—which are the special steels required for defense purposes—can be made in electrical steel furnaces now operating. In the case of the highly vital vacuum melted steels (see R. 196), 20 of 23 companies utilizing this process are not on strike. See Appendix A.

But even if specialty steel requirements for defense cannot be fully met from nonstruck mill capacity, the unavailable quantity is exceedingly small. The total steel requirements of all kinds for defense purposes do not exceed 1.2 percent (R. 91). Specialized steel requirements must constitute a fraction of that 1.2 percent. And the fraction of that fraction which cannot be supplied by the plants now working must be minute indeed. We cannot know how minute because the Government has not informed the Court, or the parties, what kinds of steel it lacks, how much of it, or what plants make it.

It is this central and indisputable fact which exposes the fundamental statutory misconception upon which the finding of peril to national safety rests. For, assuming the ad-

equacy of the finding of peril to the national safety, missing is the indispensable companion finding or basis for one that this peril is the consequence of the shutdown of a substantial part of the industry. To acquire jurisdiction to issue an injunction, Section 208(a) requires that the District Court make two findings, namely, that the "threatened or actual strike or lock-out" (1) "affects an entire industry or a substantial part thereof" *and* (2) "if permitted to occur or to continue, will imperil the national health or safety." While it is possible to read the statutory language as if these two requirements were entirely unconnected, this would plainly do violence to the legislative intention. Congress did not permit an injunction to be issued against a strike in only a small part of an industry, even though that strike imperiled the national safety. It is inconceivable that it intended, therefore, that a peril of the same magnitude should be comprehended within the statute because it occurs as a small part of an industry-wide strike.

Unquestionably the steel strike affects a substantial part of the industry. But it is not continuance of the strike in a substantial part of the industry which imperils safety. At most, it is only continuance of it in that handful of mills necessary to produce specialized steel that can be said to do so. By no latitude of interpretation can that handful be described as a "substantial part" of an industry comprised of 310 steel plants on strike (R. 172), and 63 non-struck steel companies (R. 99-102), themselves operating several hundred hot rolling mills (R. 123).

The error in the Government's reading of the statute is confirmed by comparing the steel industry with the industry upon which Congress primarily focused in enacting it: coal. S. Rep. No. 105, 80th Cong., 1st Sess., 14, in 1 Leg. Hist. 121. In the coal industry, unlike steel, a substantial part (indeed a majority) of the total production is used for purposes directly affecting health and safety. See Appendix C to this brief. When Congress, looking at the coal in-

dustry, limited the injunctive remedy in the way that it did it surely did not mean to cover every industry, regardless of the proportion of its products which are related to health or safety.

Furthermore, unlike the coal industry, there are in steel separate collective bargaining agreements at least equal in number, and separate collective bargaining units which far exceed in number, the 95 employer defendants in this case. Nor is there a single dispute. There are at least as many disputes as there are employer defendants, and while there are issues common to the disputes, there are differences among them as well.[5] Nothing prevents individual companies from separately settling their disputes with the Union—as some have done. It is unthinkable, therefore, that where the peril, if there be any, emanates from the disputes at an insignificant number of these companies, the statute empowers the District Court to bring to a standstill the strike in the whole of the industry. Congress did not arm the District Court with an elephant gun to bring down a gnat.

The Court of Appeals does not meet this argument directly but makes certain statements which are relevant to it. It relied upon the affidavit of Dr. Raymond J. Saulnier, Chairman of the Council of Economic Advisers, to support the view that "a selective reopening of a small number of mills to meet national defense needs" is not practicable (R. 300-302). This affidavit, it may be noted, is not a statement of facts in the testimonial sense, but an advocate's argument on behalf of a cause.

Dr. Saulnier makes three points. First, he quotes from the Business and Defense Services Administration that "to satisfy defense requirements" "it would be necessary to reactivate 25 to 30 hot rolling mills together with supporting facilities, and this "would be totally impracticable" (R.

[5] For some of the differences, see R. 17, 21, 23.

196). However, a single integrated plant can and often does comprise 25 to 30 hot rolling mills and supporting facilities. This is essentially the situation with respect to the reactivated Kaiser plant, and there was nothing impractical about reopening it. (R. 319. See also Appendix B to this Brief).

The only impracticality identified by the Business and Defense Services Administration is that it would not be feasible to reopen the plant "to meet only defense requirements . . ." (R. 196). But there is nothing to say that the plant could not be opened for all purposes—civilian and defense production. Surely it is not less practical to reopen one plant for all purposes rather than to reopen all 310 plants for all purposes, when the sole justification for reopening any struck plant is a minute amount of specialty steel needed for defense purposes. The statement of Robert R. Nathan in his affidavit stands quite unrefuted that specialty steel for defense "could certainly be produced in a very small number of mills which might be reopened to assure the availability of such special items" (R. 92).

The second point that Dr. Saulnier makes, relied upon by the Court of Appeals (R. 301), is that "Obtaining adequate supplies of . . . essential civilian items of steel, like obtaining steel for defense purposes, would clearly require the opening of more than just a few mills" (R. 197). But the record does not establish any shortage of "Essential civilian items of steel." Quite to the contrary (R. 69-91[6]). This consideration is therefore irrelevant.

The last point made by Dr. Saulnier, relied upon by the Court of Appeals (R. 300-301), is that "even if it were tech-

[6] In an apparent attempt to refute this, the Government's brief quotes Dr. Saulnier's affidavit, which in turn summarizes the view of unidentified "experts" (Govt. br. p. 50, n. 27). But no affiant testifies to essential civilian shortages, and there is no finding of fact that such essential civilian shortages exist.

nically possible to resume steel production on this selective basis, to do so would be exceedingly uneconomic and wasteful," and "would be offensive to the public conscience, as well as to the public interest" (R. 197). We have shown that there is nothing uneconomic or wasteful in reopening one or a few plants for all purposes, and nothing which precludes it. This aside, what is truly "offensive to the public conscience, as well as to the public interest," is to force over 500,000 workers to return to work against their will, and to set at nought the immense sacrifices they underwent in exercising their right to strike. Especially is this so when all that is in the balance on the other side is presumed waste and inefficiency.

It is thus clear that any peril to defense (if peril there be) arises from a shortage of certain specialty steels (if shortages there be) producible in a handful of struck mills (if indeed it cannot all be acquired from mills now in operation). All danger to defense arises at best from a shutdown of a few mills and can be averted by reopening these mills. This situation fails to meet the statutory test for vesting the District Court with jurisdiction: namely, that a shutdown of a *substantial* part of an industry imperils safety. The District Court acquires no jurisdiction to enjoin a strike in the whole of an industry because of danger which emanates from the shutdown of an insubstantial part of it.

Nor can the Government plead that this interpretation of the statute leaves it helpless to meet the peril. First of all, the Government has never asked the Union or any steel company to reactivate any plants necessary for defense, and there is not the slightest reason to suppose that either would be deaf to such a request. In fact, the Union has cooperated to remove steel from struck mills required for defense purposes (R. 106-107, 111-116). And reactivation of particular plants by consent is a procedure comprehended by Section 708 of the Defense Production Act of 1950 which provides that (50 U.S.C. App. § 2158):

> "The President is authorized to consult with representatives of industry, business, financing, agriculture, labor and other interests, with a view to encouraging the making by such persons with the approval by the President of voluntary agreements and programs to further the objectives of this act."

Since the "objectives of this act" are "to provide for the national defense and national security" (50 U.S.C. App. § 2062), it is clearly within the contemplation of that Section for the President to "encourage" management and labor to make some arrangements whereby production of essential defense materials would be continued despite the existence of a labor dispute.

Secondly, if compulsion is necessary, the President has the power under the Defense Production Act of 1950 "to require acceptance or performance" of defense contracts or orders in preference to other nonessential orders, and "to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense." (50 U.S.C. App. § 2071.) Furthermore under Section 18 of the Selective Service Act of 1948, 50 U.S.C. App. § 468, the Government is authorized to place orders for materials the procurement of which has been authorized by Congress for the exclusive use of the armed forces or the Atomic Energy Commission. Any person receiving such an order has a legal duty to fill it within the time period prescribed by the order or as soon thereafter as possible. If he fails to do so,

> "the President is authorized to take immediate possession of any plant, mine or other facility of such person and to operate it, through any Government agency, for the production of such articles or materials as may be required by the Government."

See Mr. Justice Clark in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 663, 664-666 and n. 14.

There is, accordingly, no statutory foundation for an injunction against a strike in an entire industry based upon peril emanating from a shutdown of a minute part of it.

C.—*The Findings of the District Court as to the Peril to Health or Safety Are Unjustified Even on the Government's Version of the Meaning of the Terms.*

We have shown that detriment to economic well-being is not relevant to "health." We have also shown that peril to "safety" which emanates from a shutdown of an *insubstantial* part of the industry does not suffice. There is therefore no peril to national health or safety within the meaning of the statute. We now show that, even in the Government's version of the meaning of the terms, no danger to either can properly be said to exist on the basis of the record here.

Section 208(a) requires a finding by the District Court that a "threatened or actual strike or lock-out . . . if permitted to occur or to continue, *will imperil* the national health or safety" (emphasis supplied). The words "will imperil" bespeak futurity and necessarily entail a prediction of the consequences of the occurrence or continuance of a shutdown. But, while the statute requires protection, it looks to imminent consequences, not to prophecies of distant or even intermediate effects. The word "peril" itself implies immediacy and imminence. Any different view is inconsistent with the concept of "national emergency." And to look to other than near-term consequences requires the capacity of a seer, not a judge.

Not only must the consequence be imminent, it must also be grave. It is not enough, as the Government seems to suggest (Govt. br. pp. 12 and n. 7, 13, 17, 24), to have a "detrimental," "adverse," or "appreciable" effect. It

is *peril* which is the standard. Danger is the criterion. As Judge Hastie correctly observed (R. 311, n. 1), the statute is premised on peril "imminently and seriously" apprehended.

The District Court found, in the statutory language, that "The strike, if permitted to continue, will imperil the national health and safety . . ." (R. 248). The finding rests upon evidence which is conclusory in nature and unsupported by a sufficient particularization of subsidiary data necessary to justify and evaluate the conclusion. The vice of an unsubstantiated conclusion is especially apparent where, as here, the affiant stating the conclusion cannot be basing it upon his own knowledge of the underlying data but must himself be relying upon reports from his subordinates or others. Thus the Acting Secretary of Defense vouchsafes "the opinion of those persons in the Armed Services who have the greatest knowledge of these matters" (R. 168); the Deputy Administrator of the National Aeronautics and Space Administration bases his information on "regular and periodic reports" received by him (R. 175); and the Chairman of the Council of Economic Advisors reports "facts . . . noted by experts intimately acquainted with the current situation" (R. 197).

The failure to particularize the data supporting the conclusion not only disables the finder from knowing and evaluating the facts, but it also detracts from the worth of the conclusion because it has been made without the discipline which comes from carefully marshaling that data. The affiant may indeed discover, were he under the compulsion of adequate particularization of the basic data, that he has been acting on the basis of an unverified impression rather than fact.[7]

[7] While we of course do not rely upon it to establish any fact material to this case, our point is illustrated by a news report in the New York *Times*, October 30, 1959, p. 12, cols. 6 and 7:

> The Government contends that a steel shortage is hurting

The vice is deepened when the affiant avowedly expresses his opinion and the basis for his value judgment is the unparticularized information he received from others. Opinion evidence is admissible and to a degree unavoidable in a proceeding of this kind. But as in any proceeding, so here, "opinion evidence, to be of any value, should be based upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon disclosed facts is of little or no value." *Balaban & Katz Corp.* v. *Commissioner of Internal Revenue*, 30 F. 2d 807, 808 (C.A. 7).

One last preliminary point should be made. The governmental affiants are in effect parties to the action and their *ex parte* representation must be evaluated in the light of their partisan interest. *Cf. Application of Lurelle Guild*, 204 F. 2d 700, 703-704 (C.C.P.A.). Their affidavits can be assumed to have been carefully constructed so as to state the most that can be stated in support of the Government's position. They were executed after the Union had publicly stated, before the Board of Inquiry, that it would contest the issue of health and safety and after the Union had made available to the Government, through the Board of Inquiry, the proof which it proposed to submit in sup-

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defense production and otherwise causing an emergency. But qualified sources at the Pentagon said the steel strike had had no impact on the defense program so far.

This observation was made in the face of contrary public statements by Secretary of Defense Neil H. McElroy and other high officials.

Secretary McElroy said in New York yesterday that strike-induced steel shortage was causing delays in production in "certain essential areas, such as missiles."

In Mr. McElroy's department, however, competent officials said that so far nothing had been slowed. These officials said the first expected pinch that concerned them was a shortage of steel plates for submarine construction. That shortage, they said, was at least a month away.

port of its contention. Under these circumstances, the affidavits must, we believe, be constructed strictly against the Government. Where ambiguous language is used, and there is a failure to state specifically what the Government obviously desired to have stated for the purpose of this law suit, it must be assumed that the absence of such a statement occurs only because the statement required by the Government could not be made. Cf. *Mearns* v. *Harris*, 43 App. D.C. 536.

There is contained in the record, in the application for further stay below (R. 271-273), a detailed analysis of the ambiguities, omissions and non-sequiturs in the Government's affidavits. We will not repeat that analysis here. It is sufficient to say simply that, in this entire record, there is not one piece of straightforward and precise evidence which says "Steel of Type XYZ (or plates so many inches wide, etc.) is necessary for the production of a named missile (or a submarine, etc.) and is not available because of the steel strike."

This omission is particularly significant when it is noted that it does not follow from the fact that an isolated metal is normally made only by a struck company that such metal is in short supply for defense purposes. In the case of most specialty steels, a particular item which is normally produced only by struck mills can in fact be produced in alternative facilities now operating. In other cases, steels having essentially the same properties can be substituted. The data supporting this conclusion are set forth in Appendix A.[8]

[8] In the light of this understanding, a statement, such as that contained in the Gates affidavit (R. 169) that "the steel specified in the procurement contracts" for a missile is not common to commercial usage should not be confused, as the Government's brief does (p. 12), with a statement that such steel cannot be obtained because of the strike or that failure to obtain the "specified" steel because of the strike will affect the production of the missile. Nor, we believe, should statements as to shortages and delays not specifically

The infirmity in the evidence incurably infects the findings of fact upon which the District Court relies for support of its ultimate conclusion of peril to national health and safety. Some findings are inadequate on their face; others fail for insufficient support in the evidence. None establish a cogent and imminent peril to national health and safety.

1. The District Court first found that (R. 246):

> Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports. Any further delay in resumption of steel production would result in an irretrievable loss of time in the supply of weapons systems essential to the national defense plans of the United States and its allies.

The first sentence repeats the identical statement in the affidavit of the Secretary of Commerce (R. 162). The statement is totally unsubstantiated. And, as we have shown above, data of which the Court may take judicial notice show the absence of a firm basis for the statement.

The second sentence of the finding repeats the identical statement in the affidavit of the Acting Secretary of Defense (R. 168). The "weapons systems" referred to in that affidavit are the "Three basic ballistic missile weapon systems . . . [known as] the ATLAS, TITAN, and POLARIS" (R. 169). The affidavit enumerates a number of instances, existing or anticipated, of delay in meeting completion dates of particular phases of the programs (R. 169-170).

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ascribed to the steel strike (R. 169-170) be assumed, as the Government's brief assumes (p. 12), to be the equivalent of statements that the shortages and delays are due to the strike. There is a strike. There undoubtedly have been shortages and delays in the missile program. One cannot be assumed necessarily to follow from the other.

But the affidavit does not state the relationship of the delayed phases of the program to the whole of the program. For example, it states that "delays in construction schedules of two to three months are anticipated at four major launching sites" (R. 170). It does not state, however, how many launching sites are presently in readiness, nor the importance of the addition of these four to over-all effectiveness. And, while it states that two to three months' delay is anticipated, it does not state whether the construction schedule calls for completion one, two or three years hence. A two month delay in a project not to be completed for three years would not seem to be perilous.

The District Court must find peril to safety. But it can only find it by taking on faith the opinion of the Acting Secretary of Defense. The District Court must take on faith both the fact of serious and imminent peril to the missiles program and the fact that the missiles program is so interrelated to over-all defense needs that peril to one is danger to the other. There is no basis in the Acting Secretary's affidavit from which the District Court can determine for itself that a number of delays in certain phases of the missiles program imminently and gravely imperil safety.

2. The second finding of fact of the District Court is that (R. 246):

> The planned program of space activities under the direction of the National Aeronautics and Space Administration has been delayed by the strike and will be further delayed if it is continued. Specifically, project MERCURY, the nation's manned satellite program, which has the highest national priority, has been delayed by reason of delay in construction of buildings essential to its operation. This program is important to the security of the nation. Other planned space programs will be delayed or threatened with delay by a continuation of the strike.

This finding is based on the affidavit of the Deputy Administrator of the National Aeronautics and Space Administration. (R. 174-177). The space activities described are unrelated to defense. They pertain to research into exploration of space. As the affidavit states, the National Aeronautics and Space Administration is responsible under its statute "for planning, directing, and conducting 'aeronautical and space activities' sponsored by the United States, *except* that such activities 'peculiar to or primarily associated with the development of weapons systems, military operations, or the defense of the United States' are the responsibility of the Department of Defense" (R. 174, emphasis supplied). And, as the affidavit further states, "'aeronautical and space activities' is defined" by the statute as meaning "'(A) *research into*, and the solution of, problems of flight within and outside the earth's atmosphere, (B) the development, construction, testing, and operation *for research purposes* of aeronautical and space vehicles, and (C) such other activities as may be required for the exploration of space'" (R. 174, emphasis supplied). Delay in research into space is unfortunate, but it will hardly support a finding of peril to the national safety. The Court may take judicial notice that space research has been and is retarded by factors far more significant than the steel strike.

3. The third finding made by the District Court is that (R. 246-247):

> Nuclear Submarines and the naval shipbuilding program other than submarines, including new construction, modernization, and conversion, have been affected by reason of the inability to secure boilers, compressors, and other component parts requiring steel. Products of the steel industry are indispensable to the manufacture of such items and delay in their production will irreparably injure national defense and imperil the national safety.

This finding is a paraphrase of the equally unparticularized statement in the affidavit of the Acting Secretary of Defense (R. 170). It is clear on the face of the finding that the adverse effect described in it cannot be attributed to the steel strike. The first sentence of the finding states that it is "inability to secure boilers, compressors, and other component parts requiring steel" which is the cause of the difficulty. But there is nothing in that sentence, or in the next one, which ascribes that inability to the steel strike. For ought that appears, either in the finding or the affidavit, the inability may be due to a strike of employees making "boilers, compressors, and other component parts," or to reasons wholly unrelated to labor disputes. It is undoubtedly true, as the second sentence of the finding states, that "Products of the steel industry are indispensable to the manufacture of such items," and it may be true that "delay in their production will irreparably injure national defense and imperil the national safety," but it does not follow from either or both of these statements that the steel strike is the cause of the difficulty.

Furthermore, all that the finding states is that certain activities "have been affected. . . ." But it is not "affect" which must be found. It is *peril* which is the standard. And the peril must be imminent and clearly manifest, not remote and uncertain.

4. The fourth finding of fact made by the District Court is that (R. 247):

> Exported steel products are vital to the support of United States bases overseas and for the use of NATO allies and similar collective security groups. The steel strike, if permitted to continue, will seriously impair these programs, thus imperiling the national safety.

This finding is a strengthened paraphrase of a bare conclusory statement to the same effect in the affidavit of the Secretary of Commerce (R. 163). There is nothing in

this finding which even intimates that the exports pertain to overseas defense efforts. If they did, we should expect the matter to be the subject of an affidavit by the Secretary of Defense, not Commerce, and it is singularly revealing that the affidavit of the Acting Secretary of Defense is silent on the subject (R. 168-171). Exports unrelated to defense in which the United States has a governmental interest pertain to political or economic affairs. Adverse effect upon these affairs, if any there be, cannot be said to imperil the national safety in the imminent and exigent sense that the statute requires.

5. The Court of Appeals (R. 305-306) and the Government (Govt. br. p. 13) rely upon the affidavit of the General Manager of the Atomic Energy Commission. The District Court, on the other hand, made no finding of peril to safety emanating from interference with atomic energy programs caused by the steel strike. Indeed, the Government proposed (R. 204), petitioner objected to (R. 220, 223-224), and the District Court declined to find that "The strike has interrupted the flow of steel for such uses as . . . atomic reactors for naval propulsion." And the reasons for not finding detriment to atomic energy programs seem evident. For the affidavit states that supplies have not "been materially affected by the steel strike . . . up till now"; delays which have occurred are "so far of a minor nature"; and only if "the strike continues into early 1960," would there "be an appreciable effect upon the weapons program" (R. 178-179). One prediction which may confidently be made is that, if no injunction is issued, the strike will be settled well before 1960 (R. 40-41).

6. The lack of any genuine shortage of steel for defense needs is cogently evidenced by the uncontroverted fact that the Government itself has not regarded the effect of the steel strike to be sufficiently serious to invoke the powers which it has to assure itself of an adequate supply of steel for defense purposes from existing inventory and

from productive capacity of non-struck mills. The Defense Production Act of 1950 empowers the President or his delegate to establish priorities and allocate materials needed for defense.[9] The Government through the Business and Defense Services Administration, its agency for this purpose, has not yet utilized its full power under this statute. On July 20 and 28, within two weeks after the beginning of the strike, the BDSA simply announced through two releases that it had taken certain steps to keep itself informed of the steel situation, that it had formally reminded the nonstruck companies of their responsibilities under the law, and that additional steps would be considered if the strike continued (R. 106, 109-110). The BDSA did nothing further until October 16, one week after the President convened the Board of Inquiry. On that date the BDSA issued an order accelerating the delivery of steel for defense purposes by struck companies upon resumption of operations and by nonstruck companies immediately (R. 166; BDSA Order M-1A). To this date,

[9] Section 101 of that Act, 50 U.S.C. App. § 2071, provides that:

"(a) The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

"(b) The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

however, the BDSA has not "frozen" any type of steel, either in inventory or to be produced by nonstruck mills, by requiring that it be devoted exclusively to defense needs. In contrast, in the 1956 steel strike, the BDSA on July 20, 1956, on the twentieth day of the strike, issued an order prohibiting "shipments against unrated [nonessential] orders of all types of aircraft-quality steel, nickel-bearing steel plate over 72 inches wide, or nickel-bearing stainless steel plate over ½ inch thick." 21 Fed. Reg. 5484 (July 21, 1956). The failure of the Government to yet use its full power in the current situation is eloquent testimony of the lack of any genuine shortage of steel to meet defense needs.

7. The last finding of fact made by the District Court to show peril is the idling of men and facilities as a result of the strike (R. 247). As we have stated, detriment to economic well-being is irrelevant to health in the statutory sense. This aside, as the careful affidavit of Leon H. Keyserling shows, the level of economic activity in this country is higher now, despite the strike, than it was during the economic recession experienced in 1958, and the Administration did not regard the 1958 conditions as sufficient to call forth an affirmative program to restore maximum production, employment and purchasing power (R. 94-97). Furthermore, statements and statistics of the United States Department of Labor show that, while 1958 unemployment went as high as 5,437,000, current unemployment is slightly more than 3,000,000, and is not likely in the near future to reach the 1958 magnitude (R. 107-108). Indeed, the District Court found as a fact that even if the strike continued through December, strike-caused unemployment would increase by only 2¼ million (R. 246).

The state of the economy is not, therefore, subject to any vicissitudes caused by the steel strike which are different from the cyclical fluctuations that the economy continuously undergoes. Indeed, as the October report of

the Council of Economic Advisors, chaired by Dr. Raymond J. Saulnier, shows, the economy is booming, with gross national product, income, and employment substantially ahead of a year ago. Economic Indicators, October 1959, Council of Economic Advisors, Joint Economic Committee, 86th Cong., 1st Sess. Only the gloomiest prognosis, based on an assumption that the steel strike will never end, can even colorably suggest the view that the economy as a whole is any serious jeopardy.

The Government in its brief, not content with suggesting economic paralysis where none exists or impends, goes even further. It states that, although food, medical care, heat, and shelter are available, physical health is nevertheless impaired because widespread unemployment has deprived the public of the wherewithal to buy these goods and services (Govt. br. pp. 49-50). The Government paints with a far-fetched brush. There is nothing in the record to show that, now or in the future, there are any who are hungry, sick, cold, or homeless because of the steel strike—except, perhaps, the strikers. And the Union will take care of its own.

Finally, the Government reaches the heights of hyperbole in quotation from the "affidavit" of Dr. Saulnier to the effect that to continue the steel strike—or, more precisely, not to discontinue it for 80 days—will trammel the "confidence of friendly and uncommitted nations," weaken "deterrence of potential aggressors," and "invite military adventurers to set small wars in motion" (Govt. br. p. 49). The nation's spokesmen in foreign affairs are the President and the Secretary of State. The President expressed no such alarm in his statement explaining his reasons for invoking the statute (R. 10). The Secretary of State has made no affidavit at all. And we can hardly imagine less likely consequences from the steel strike. To suggest such fears is to reveal, we believe, the bankruptcy of the Government's attempt to show genuine peril to natural health or safety. None exists.

II. THE JUDGMENT BELOW MUST BE REVERSED EVEN IF IT IS CONCEDED THAT THE GOVERNMENT HAS MET THE BURDEN OF PROVING THAT THE JURISDICTIONAL PREREQUISITES OF SECTION 208 WERE SATISFIED.

We have shown above that the judgment here must be reversed because the Government failed to prove on final hearing, by a clear preponderance of the evidence, that the statutory prerequisites established by Section 208 for the kind of injunction issued here were met.

We will now show that, even if it be assumed that the Government technically satisfied the jurisdictional requirements of Section 208, the judgment below should be reversed for each of the following entirely separate and independent grounds: (a) the District Court completely failed to consider the equities before issuing its order and thus failed to perform an essential part of its function, (b) the Court of Appeals erred in sustaining the District Court's judgment in the face of the District Court's failure to exercise its discretion, and (c) the application of equitable discretion and a balancing of the equities in this case would have justified withholding of an injunction or, at most, an injunction limited to the tiny fraction of the several hundred struck plants which might be required to satisfy the isolated shortages of specialized steel products, if any, needed for national defense to avert imperiling the national safety.

A. *The District Court Has Discretion Under Section 208*

The union urged strongly upon the District Court, both orally (R. 131) and in its memorandum, that the court had discretionary powers and that it should exercise them in favor of refusing the injunction order requested by the Government. The Government, in its brief to the District Court, simply ignored the question and assumed that if

the statutory requirements were met an injunction against the strike should issue as a matter of course.* There was no further briefing in the Court of Appeals. In the oral argument there the union again urged that the District Court had discretion. Counsel for the Government first argued that an injunction against the strike was mandatory and, then under questioning by the Court, agreed that the Government's position might be said to be that the discretion which is ordinarily present "was squeezed out, so to speak." (Transcript of Argument, pp. 94-97.)

In its brief in opposition, the Government is not clear on this issue, although the petition for certiorari raised it explicitly. A fair reading of that brief, however, leads to the inference that the Government's present position is that the District Court lacks discretion and is required to issue an injunction when peril to the national health and safety are proved. Thus, the Government says that Congress has determined "that the national interest *requires* a temporary cessation of a concerted work stoppage where the conditions prescribed by the statute are found to exist." The Government adds "that in any case where the required emergency conditions are found to exist, the policy determination that an injunction would serve the national interest is to be found in the statute and *is not an issue for the court*," (Brief in Opposition, pp. 53-54, emphasis added).

We submit that the Government's apparent position as to the mandatory nature of the District Court's function on issuance of an injunction is plainly wrong. In our view, the statute must be read as vesting discretion in the District Court to determine whether to grant or deny an injunction, and also, if an injunction is to issue, whether it should embrace the entire strike and all of the strikers at the scores of companies involved in separate disputes

* Both the union's memorandum and the Government's brief are in the original record which has been forwarded to this Court by the Court of Appeals for the Third Circuit. They were, however, omitted from the printed record by stipulation of counsel.

with the union, or just that small percentage of the struck mills which alone create any peril to national safety.

Our views on this question are based, first, on the statutory language. Section 208 of the Act provides only that if the district court makes the enumerated findings as to the scope and effect of the strike, then "it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate." It does not say that the Court "shall" issue an injunction but only that it shall have "jurisdiction" to do so.

That the language was intended to be permissive and not mandatory is underlined by the contrast between the language of Section 208 and Section 210. Section 210 requires the Attorney General, after the last offer vote or a settlement of the dispute, to move to discharge the injunction, which motion, the statute says "*shall* then be granted and the injunction discharged." Congress thus demonstrated in the very title of the statute under consideration that it knew how to write language which differentiated between mandatory and discretionary action by the district court. It deliberately chose, in Section 208, only to grant "jurisdiction" to the district court and thereby to allow the court to exercise its jurisdiction in the discretionary manner in which courts of equity have traditionally exercised their jurisdiction.

To read the statute as mandating an injunction is to delete from the phrase "shall have jurisdiction to enjoin" the words "have jurisdiction to," with the result that the statute is truncated to a command that the District Court "shall . . . enjoin." Such a textual mutilation is at war with the principle of equitable discretion which is at the heart of the exercise of the Chancellor's functions.

"We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal

to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' [Citation.] The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity had distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. . . . [I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities of §205(a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329-330.

It was *Hecht Co.* v. *Bowles*, indeed, which the Government relied on in *United States* v. *United Steelworkers of America*, 202 F. 2d 132, certiorari before judgment denied, 344 U. S. 915, to justify the existence of discretion in a Section 208 proceeding. In its brief in the Court of Appeals for the Second Circuit in that case, the Government argued as follows (p. 21):

> "The power under the present Act to exercise discretion in granting or withholding an injunction means no more than that in each case the court must balance the equities. For example, it is conceivable that a case may occur which, although within the statute, involves relatively slight danger to the public safety and a pros-

pect of severe injury to the economic interest of the strikers. In such a case the court might refuse an injunction." [24]

[24] "Under ordinary principles, such a matter is largely within the discretion of the district court. . . ."

The Court of Appeals here concurred unanimously in that view, but the judges disagreed as to the consequences of their agreement. Judge Hastie, of course, based his dissent on the very ground that the trial court abused its discretion in issuing the injunction (R. 310-317(. The majority opinion, by Chief Judge Biggs, sustained the judgment below not on the theory that, upon the evidence, an injunction had to issue but, to the contrary, on the theory that the trial court "in the exercise of its sound legal discretion" could have decided either way and the way it did decide could not be said to be an "abuse" of that discretion. (R. 310)

We believe, in sum, that the judges in the court below, and the Government in the *Steelworkers* case in the Second Circuit, were correct, and that any contention that the issuance of an injunction under § 208 is mandatory is plainly erroneous.

B. *The District Court's Failure to Consider the Factors Bearing on the Exercise of Its Discretion Was Error.*

That the district court did not attempt to consider the factors bearing on the proper exercise of its discretion is clear from the record. The transcript of the proceedings before the district court on October 21 (R. 220-244) is devoid of the slightest suggestion that the court recognized that it had any discretion in the premises. In his brief oral statement (R. 239) the District Judge stated simply that he would sign findings of fact and conclusions of law meeting the statutory requirements and that he would therefore issue an injunction. The court overruled the proposed

conclusion of law submitted by the union that the court had discretion, as well as the union's proposed findings of fact which would have required the exercise of discretion (R. 214-215).

The findings and conclusions adopted by the court contained no reference to any equitable considerations other than the absence of an adequate remedy at law and simply concluded that the Government was entitled to the relief prayed for because of the findings as to safety and health.

Further, the injunction order itself is totally silent on the reasons for its issuance. Plainly, therefore, and in light of the requirement of Rule 65 (d) that the reasons for granting an injunction be set forth by the issuing court, it must be concluded that the district court simply assumed that the injunctive remedy was mandatory, and issued its injunction on that assumption.

If we are correct in our argument so far this, in itself, was error. There were presented to the the District Court several alternative courses of action. The union urged that no injunction was warranted because it would prevent a settlement which could be expeditiously achieved in the absence of an injunction. The union also urged denial of an injunction because alternative statutory remedies are available to cope with any possible defense needs. Finally, the union urged that if an injunction must issue, it should be limited to the handful of plants which might be needed to produce the specialty steels claimed to be required for the defense program.

The choice as to these alternatives was properly to be made by the District Court, not on the bare facts of the affidavits filed by the parties but after inquiry, examination and discussion with the parties and their counsel. The failure of the District Court even to inquire into these matters properly bearing on the exercise of its discretion is emphasized by the statement of counsel for the union to the court that it was the policy of the union to cooperate

with the Government in obtaining any steel necessary for national defense, and the proof on that issue submitted by the union. (R. 150-151)

C. *The Affirmance by the Court of Appeals Was Based on an Erroneous Premise.*

As we have stated the Court of Appeals here neither concluded that an injunction under Section 208 was mandatory nor that, on the record, the only discretion which the trial court could have exercised was in favor of an injunction. To the contrary, the court concluded only that no case had been made on appeal for concluding that the trial court's action exceeded the limits of its discretion.

It thus affirmed the judgment on a basis wholly without warrant on the record. It simply cannot be said, as Chief Judge Biggs did, that the court below might properly have decided either way "in the exercise of its sound legal discretion" (R. 310) and that, therefore, there was no reversible abuse of discretion. For the court below exercised no discretion. If the premise upon which the Court of Appeals decided the case was correct, therefore, its judgment should be reversed and the cause should be remanded to the District Court so that it can do what the Court of Appeals assumed it did: consider whether, as a matter of sound equitable discretion, an injunction of the kind requested by the Government should be issued.

D. *It Would Not Have Been an Abuse of Discretion for the Trial Court to Refuse to Issue the Injunction Requested by the Government*

There is one basis upon which the action of the trial court can be sustained here, even though that court failed to address itself to the relevant equitable considerations. That basis is a conclusion, on the bare face of the record here, that the only proper exercise of discretion in this

case would have been to issue an injunction in the form requested by the Government. We do not believe that any such contention can be successfully maintained. There are a number of factors which, had they been considered by the trial court, would clearly have justified an exercise of discretion in favor of either refusing any injunctive remedy or limiting the injunction to the imperative needs of the national safety.

1. The first consideration is the one set forth in the dissenting opinion of Judge Hastie below. In its brief the Government urges that Judge Hastie was in error. In doing so, however, it overlooks the major premise upon which he relied. That premise was that, on the record, it was the very anticipation of the injunction by the employers which prevented a settlement of the dispute. Judge Hastie did not argue, as the Government seems to say, that an injunction should not be issued because it would have the "incidental consequence of strengthening the bargaining position of one party." (Brief in Opposition, p. 54) To the contrary, his dissent was based upon the proposition that in order to meet the statutory objectives stated by the Government—"to safeguard the safety and health of the nation"—the injunction should not issue. If we accept the factual premise from which Judge Hastie argued, and on the record we submit that this premise cannot be controverted, the peril to the safety and health of the nation would be enlarged rather than diminished by the issuance of an injunction. The fact that an injunction would not "facilitate a settlement" is relevant not only to the statutory objectives of the Act of which Section 208 is a part—namely to achieve settlements of labor disputes through free collective bargaining—but also to the objectives of Section 208 itself. For if it is assumed that an injunction would inhibit a settlement, the peril to the national health or safety claimed to arise from the failure of a settlement would be eliminated if an injunction were

refused and, on the other hand, would merely be postponed if an injunction were granted.

We need not urge, be it noted, that the views expressed by Judge Hastie are the only views to which a district court examining the situation could come. We need only urge that this result is one which would be permissible if the district court had addressed itself to the question. And, in support of our contention we have not only the dissenting views of Judge Hastie but also the view of the majority below. For, as Chief Judge Biggs' opinion states:

> ". . . the court below in the exercise of its sound legal discretion might have found that the exercise of the provisions of Sections 178 and 179, 29 U. S. C. A., would be ineffectual, rather than efficient, to quell labor strife and obviate the menace to national health or safety . . .". (R. 310).

2. A second consideration which would justify the refusal to issue an injunction against the strike as a matter of discretion is the availability of other and less drastic remedies to relieve the situation. Surely, a court of equity could consider the failure of the Government to exercise fully its allocation powers under Section 101 of the Defense Production Act, 50 U. S. C. App. §2071, to meet any defense needs, (which we have set forth in Part I, *supra*) as a sufficient basis for refusing to issue an injunction against 500,000 strikers to achieve the same objective. There are, in addition, other available statutory remedies which the Government has failed to utilize. Section 708 of the Defense Production Act of 1950 (50 U. S. C. App. §2158) provides for reactivation of particular plants by consent between labor and management. This section is as follows:

> "The President is authorized to consult with representatives of industry, business, financing, agriculture, labor and other interests, with a view to en-

couraging the making by such persons with the approval by the President of voluntary agreements and programs to further the objectives of this Act."

Significantly, the Government has never asked the union or any steel company to reactivate any plants necessary for defense, and there is not the slightest reason to suppose that either would be deaf to such a request. In fact, the union has cooperated to remove steel from struck mills required for defense purposes (R. 107, 111-116). Since the "objectives of this act" are "to provide for the national defense and national security" (50 U. S. C. App. §2062), it is clearly within the contemplation of that section for the President to "encourage" management and labor to make some arrangements whereby production of essential defense materials would be continued despite the existence of a labor dispute.

Finally, Section 18 of the Selective Service Act of 1948 (50 U. S. C. App. §468) authorizes the Government to place orders for materials the procurement of which has been authorized by Congress for the exclusive use of the armed forces or the Atomic Energy Commission. Any person receiving such an order has a legal duty to fill it within the time period prescribed by the order or as soon thereafter as possible. If he fails to do so

> "the President is authorized to take immediate possession of any plant, mine or other facility of such person and to operate it, through any Government agency, for the production of such articles or materials as may be required by the Government."

This provision is available for use if the failure to fill an order arises as a result of a strike, as Justices Jackson and Clark noted in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 639, 664-666.

3. The final consideration which would have justified the trial court in reaching a different result if it had exercised its discretion, is the fact that a much more limited

injunction than the one actually issued would clearly have served to meet any demonstrated peril to the national health or safety. We have argued, in part I-B, above that Section 208 does not authorize an injunction against a strike in an entire industry because the disputes between the union and a very small number of employers in the industry creates a peril to the national health or safety. Even if we are wrong in that contention as a matter of power in the district court, certainly we are correct that it would not have been an abuse of discretion for the trial court to have limited its injunction to the selective reopening of the few plants which would indisputably meet any conceivable defense needs for steel.

The court of appeals appears to have rejected this consideration solely on the ground that such selective reopening would be impractical. The district court of course, did not even inquire into the subject. If it had, it would have found, as we have demonstrated in Part I-B above, that the opening of the few plants which at most are necessary to meet the defense needs for steel would be entirely practical.

On the record here it is impossible to say which plants or which companies should have been required to resume production. The reason, of course, is that the Government never specified in the district court, or anywhere else, precisely which kinds of specialty steel products were in short supply and essential to the national defense. But its case with respect to the national safety rested, not on the loss of steel tonnage—for more than 15 percent of steel capacity is still operating to meet the 1 percent of normal production used for defense purposes—but on the claim that there were special steels which the operating companies could not make. We have disputed that claim. But even if we concede that it was proved, surely it cannot sensibly be argued that the trial court, in the exercise of its sound legal discretion, could not have limited its in-

junction to the producers of these specialty steels. Indeed, although it is unnecessary that we do so, we go further. We think that it would have been an abuse of discretion for the trial court to have refused so to exercise its discretion.

The majority below seemed to have been influenced to their conclusion that the sweeping injunction issued by the trial court was not an abuse of discretion by the view that only if an injunction were issued could the administrative machinery provided in Section 209 be employed. But, as Judge Hastie pointed out, an injunction against the strike as such is not necessary to activate these procedures (R. 316-317). An injunction in the terms of paragraph 5 of the order entered by the District Court (R. 250) would suffice. Even if an injunction against a strike should be regarded as necessary, one requiring selective reopening of the plants would clearly constitute an adequate statutory trigger. There was, therefore, even on the reasoning of the majority of the court below, no equitable basis for issuing an injunction against 500,000 strikers. A discriminating exercise of judicial power here would have met any conceivable peril to the national defense, and, at the same time, would have preserved the values which Congress plainly wanted to preserve by limiting its interference with free collective bargaining to the minimum extent made necessary by the overriding requirements of national safety or health.

III. THE 80-DAY INJUNCTION PROVISIONS OF THE STATUTE ARE UNCONSTITUTIONAL, AS THEY CONFER ON THE COURTS DUTIES WHICH ARE NOT JUDICIAL AND ARE NOT CONNECTED WITH ANY CASE OR CONTROVERSY.

It is our contention that Section 208 of the Taft-Hartley Act attempts to vest in the federal courts powers which are outside the limitations of Article III, Section 2, of the Con-

stitution. The contention is, simply, that under the Taft-Hartley Act, the federal courts are asked to issue an injunction which is no part of "the judicial function of adjudicating justiciable controversies." *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 600.

A—*The Nature of the Statutory Scheme*

In order to put our argument in this regard into its proper setting, it is necessary to recapitulate the statutory procedure established under the national emergency provisions of the Taft-Hartley Act. The critical sections are Sections 208-210. Section 208 provides that, after receiving the report of a Board of Inquiry, the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin a strike. If the court finds that the strike meets the statutory requirements it is then given jurisdiction to enjoin the strike or its continuation and to make such other orders as may be appropriate. The next step is contained in Section 209(a). This provides that whenever a district court has issued an order under Section 208 it shall be the duty of the parties to make every effort to adjust and settle their differences with the assistance of the Federal Mediation and Conciliation Service. The Board of Inquiry is reconvened, and if the strike is not settled at the end of 60 days, the Board is required to "report to the President the current position of the parties and the efforts which have been made for settlement and shall include a statement of the employer's last offer of settlement." Within the next 15 days the NLRB conducts a ballot among the employees to ascertain whether they wish to accept the last offer. The results must be certified to the Attorney General within the next 5 days. He is then required to move the court to discharge the injunction, "which motion shall then be granted. . . ." The final step is the President's report to Congress with his recom-

mendation for its "consideration and appropriate action." [10]

This is truly a remarkable procedure, unparalleled by any which we have been able to discover. The only function conferred upon a district court by these sections is to issue an injunction which it must automatically dissolve after 80 days. That injunction serves not only as a method of terminating the strike but also as the trigger for an administrative machinery looking toward the settlement of the dispute. It is sometimes said that the injunction issued under these provisions is an 80-day injunction. This is not quite correct. The injunction is, indeed, the starting point for administrative procedures which are given a maximum period of 80 days, but the injunction can, and indeed must, be discharged if these administrative procedures are concluded in a shorter period.

The critical feature of this statutory scheme, in our view, is that Congress intended to use the judicial power, not to adjudicate rights or to compel the performance of duties, but as the necessary and prescribed premise for an administrative procedure designed to settle a labor dispute. The intention of Congress is, we think, plain. Congress did not, as the Government's brief in opposition asserts,[11] create a substantive "right of the United States and the public to be free from a work stoppage threatening the national health and safety," and provide a judicial remedy if a union refused

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[10] The House Minority Report declared of an earlier version of these provisions:

> "Under sections 203 and 204 the President, the Attorney General, the district courts, the Secretary of Labor, the Office of Conciliation, the Administrator of the National Labor Relations Act, the circuit court of appeals, and special boards would all be concerned with the handling of the most vital disputes in the country affecting the national health and safety. Everybody seems to be 'in the act' except Jimmy Durante." House Minority Report No. 245, 80th Cong., 1st Sess., p. 103.

[11] Brief in Opposition, p. 38.

to comply with its duty to end such a stoppage. Nor did it, as that brief elsewhere asserts,[12] grant an 80-day right of this character. It no doubt intended that there should be, in appropriate circumstances, an 80-day suspension, or delay, in a strike, but it specifically intended that this should be accomplished only by an injunction. The injunction was prescribed by Congress, not the suspension.

That this was the intention of Congress is clear from the words of the statute, from its legislative history, and from the method in which it has been applied in the past and, indeed, in this case. The words of the statute make it clear, we believe, that the administrative procedures prescribed in it cannot be invoked unless some sort of injunctive order issues. The statute simply cannot be read as imposing a duty to suspend a strike for 80 days in order that those procedures be invoked. There are other provisions in which Congress did intend a delay in the strike so that administrative machinery could be invoked. In Section 8(d) of the Act, 29 U.S.C., § 158(d), Congress provided that it should be an unfair labor practice to strike within a thirty-day period after the Mediation and Conciliation Service had been given notice of the unresolved dispute. It thus established a duty to postpone a strike for 30 days in order to give the Service an opportunity to settle the dispute. A union can comply with a duty thus established. In the provisions here under consideration, however, there is no way in which a union can do so.

The plain fact is that Congress did not simply want a strike which would imperil the national health or safety to be postponed for 80 days or to be interrupted for 80 days. It wanted such a strike to be *enjoined* for 80 days. And it made its intention perfectly clear by setting up an administrative clock which starts running only when an injunctive order is issued.

That it was the injunction, not the delay or interruption of

[12] Id. at 39.

the strike, which Congress wanted to provide is shown most clearly by asking whether there is any way in which a union can avoid an injunction by meeting an obligation implied from the statute. The answer clearly is no. In the American Locomotive case (*United States* v. *United Steelworkers of America*, 202 F. 2d 132) the union voluntarily delayed its strike for 261 days.[13] When it finally did strike, the Taft-Hartley procedures were nevertheless applied. In at least three other injunction proceedings brought under Section 208 there had been delays in the strike which went for nought when Sections 206-210 were invoked: the 1948 and 1949-1950 coal disputes [14] and the 1956 longeshore dispute.[15] And, of course, in this very case the union postponed its strike for 14 days—from July 1 to July 15—at the request of the President. (R. 40) Yet, in this case, the Government is asking for an additional 80 days.

The fact that there is no way in which a union can comply with the requirement for an 80-day "cooling off" period is, of course, just another way of saying that the statute sets up no standard of conduct and no definition of rights and wrongs. It is the injunction itself which measures the delay in the strike which is required by the statute and which creates and measues the duty not to strike.

The contention we make here is simply that, in so providing, Congress has put the federal district courts in a business for which they are not suited and which the Constitution has forbidden to them. We now turn to these constitutional limitations.

B—*The Constitutional Limitation*

The federal courts, under the Constitution, are limited to

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[13] Dept. of Labor, Bureau of Labor Statistics, *Work Stoppages—National Emergency Dispute under the Labor Management Relations (Taft-Hartley) Act* (Supp. 1, 1954), pp. 1-2.

[14] *Ibid.* (1952), pp. 3-4, 7-8.

[15] *Ibid.* (Supp. 3, 1956), p. 1.

"the judicial function of adjudicating justiciable controversies" (*National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 600, Opinion of Jackson, J.). Whether the source of this limitation rests solely on Article III or also, or perhaps alternatively, on the doctrine of separation of powers is not entirely clear. In the *Tidewater* case, three of the opinions, joined in by six justices, derived the limitation solely from Article III. (Concurring opinion of Mr. Justice Rutledge and dissenting opinions of Mr. Justice Frankfurter and the Chief Justice.) One opinion, that of Mr. Justice Jackson, joined by Justices Black and Burton, declared that the limitation stemmed from the doctrine of separation of powers which permeates the Constitution, 337 U. S. 582 at 590-591. This difference of opinion as to the source of the constitutional limitation is not relevant here, however, since all of the justices agreed that the courts created under Article III cannot be given functions not connected with the adjudication of cases or controversies.

There is no constitutional restriction which the Supreme Court has been more zealous to enforce. In other fields the Court has repeatedly proclaimed its reluctance to hold invalid acts of Congress, but it has shown no such reticence where Article III of the Constitution is involved. In his dissenting opinion in the *Tidewater* case, Mr. Justice Frankfurter declared:

> ". . . If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation affecting the jurisdiction of the federal courts. When Congress on a rare occasion through inadvertence or generosity exceeds those limitations, this Court should not good-naturedly ignore such a transgression of congressional powers." 337 U. S. 582 at 655.

We think that the judicial function does not include the function which Congress has sought to thrust upon the dis-

trict courts by this statute. The judicial process is a process of judging. This implies that there are parties in the case before it who have, or who may have, opposing contentions as to what their respective rights and duties under the law are. A court, when it performs the judicial function, judges these contentions and determines what the respective rights and duties of the parties are. Having made this judgment, it has certain powers to carry out that judgment. In a suit in equity, the court can enjoin the defendant to comply with his obligations under the law, or to take appropriate affirmative steps to correct a past failure to comply with his legal obligations. But in no case, we believe, can an Article III court be made the vehicle for issuing an order to a defendant to refrain from conduct not claimed to be unlawful either in the present or in the future. For when a court does so it is not judging the rights and duties of the parties—i.e., it is not adjudicating—it is itself creating rights and duties.[16]

This point was made most clearly by Mr. Justice Holmes

[16] The distinction we make here between a duty under the law and a duty created and existing only by virtue of an injunctive order is not in any way related to the argument as to whether judges make the law or merely find it. Certainly in many, if not most, cases or controversies the existence of the legal duty is unclear, else there would be no lawsuit. Whether the judge who decides what the legal duty is merely finds the law or makes it is immaterial to our argument here. Under either theory, the judge determines that there was a legal duty which should have been performed, or which should be performed in the future. Presumably any defendant with sufficient prescience as to the court's ultimate determination of the law could have complied with it without being ordered to do so. Or to put the matter another way, even if the law be described simply as an estimate of probable judicial action, persons subject to the law can make a guess as to their duties under it and perform those duties. Here, of course, that is impossible. The court neither finds nor creates law. It simply enjoins a strike which may be entirely lawful apart from the injunctive order itself. Nor can a union avoid such an injunction by correctly anticipating the court's determination of the statute's applicability and performing the duty prescribed by the statute—because the statute prescribes no duty.

in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227, in comparing a judicial inquiry with legislation:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

It does not matter that the proceeding is judicial in form or that questions are decided which might also be decided in a case. ". . . The effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, *although the questions considered might be the same that would arise in the trial of a case.*" 211 U. S. at 227. (Emphasis added) The action of a court may not be judicial "although the questions debated by it might have been the same that come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterward in a case properly so called." 211 U. S. at 227.

The words of Mr. Justice Field, quoted with approval by the Supreme Court in *Muskrat* v. *United States*, 219 U. S. 346, 357 are apt:

> "By cases and controversies are intended the claims of litigants brought before the courts . . . for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."

Most illustrative of this principle is *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447. The case involved Section 12 of the Interstate Commerce Act, which authorized the Interstate Commerce Commission "to require, by

subpoena, the attendance and testimony of witnesses" and the production of books, papers, etc., and further provided that in case of disobedience to a subpoena the Commission "may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers," etc. The validity of the Act was sustained by a vote of 5-3. The majority opinion posed the issue as follows (154 U. S. at 475-476):

> ". . . So, in *Smith* v. *Adams,* 130 U. S. 173, 9 Sup. Ct. 566, Mr. Justice Field, speaking for the court, said that the terms 'cases' and 'controversies,' in the constitution, embraced 'the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.'
>
> "'Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance."

The court pointed out that the Interstate Commerce Act authorized the Commission to summon witnesses and to require the production of books, papers, etc., and that the constitutionality of this provision was conceded. Therefore, the court declared, there was a legal duty for one so summoned to appear and testify, and the adjudication as to whether this duty had been complied with constituted the controversy before the court. 154 U. S. at 476. The dissenting justices, on the contrary rested their position primarily upon the proposition that the Act did not create any legal duty to respond to a Commission subpoena, so that there was no pre-existing duty for the courts to enforce. 155 U. S. 3, 7.

Thus in the view of both the majority and the dissenting justices in the *Brimson* case, the question whether the courts could constitutionally act depended on whether Congress

had established any rule of law they could enforce, or stated another way, on whether the defendants were under any pre-existing legal duty to act, which, if not performed voluntarily, could then be compelled by the Court.

Similarly, *Douds* v. *Retail Store Union*, 170 F. 2d 695, in which the court sustained the constitutionality of the injunctive procedures of Section 10(1) of this very Act, underlines the nature of the constitutional principle.

Under Section 10(1) the National Labor Relations Board is required to petition in a Federal District Court for injunctive relief in cases in which it "has reasonable cause to believe" that a certain type of unfair labor practice has occurred. Whether or not an injunction is issued by a district court, an unfair labor practice case under 8(b)(4) is thereafter processed just as is any other unfair labor practice case. The case will not come before the district court for further consideration, but will go to the Board, a Court of Appeals, and, perhaps, the Supreme Court.

The Court disposed of the constitutional argument in the *Douds* case quite briefly. It said: "Here was a dispute to be resolved under the direct provisions of the statute. It did not cease to be a dispute because the ultimate decision on the merits would not rest with the [District] court."

It simply is not true, as the Government says at p. 37 of its brief, that the union in that case had no "duty" to cease conduct prior to the injunction. The injunction was simply a preliminary injunction against conduct claimed to violate the National Labor Relations Act. It differed from the normal preliminary injunction only in that the ultimate disposition of the claim of illegality would be resolved by a different body than the one which issued the first order. But clearly that order issued only on a claim that the union's conduct was unlawful.

Sometimes, it is true, Congress does not spell out in words the nature of the rights and duties to be adjudicated. In a criminal statute, it sometimes does not say that an act is un-

lawful but simply that it shall be punished. The prohibition, however, is plainly implied from the punishment. *Ex Parte Siebold*, 100 U. S. 371, 388. And sometimes, it is true, it creates civil obligations in the form of a jurisdictional grant. *Pope* v. *United States*, 323 U. S. 1. But in each such case Congress has, however inartistically, imposed an obligation or created a duty and given a court power to adjudicate the question of whether the defendant has satisfied the obligation or duty. The constitutionality of the special jurisdictional act in the *Pope* case was upheld by this Court expressly on the theory that Congress, in a special jurisdictional act had "inartistically" created "a new obligation of the Government to pay petitioner's claims," 323 U. S. at 329, as well as provided a forum for the adjudication of the extent of that obligation.

The rule which all these cases establish is simply this: the judicial function is the function of settling a dispute, or a potential dispute, as to what the rights and duties of the parties are under the law, or of providing remedies where a violation of some duty has been alleged or found. The *Brimson* case establishes that the duty alleged to be owed by the defendants may be to an administrative body; the *Retail Store Union* case establishes that the ultimate disposition of the dispute need not rest with the court asked to resolve it preliminarily, the *Pope* case establishes that a statute which is jurisdictional in form may also establish the obligations to be enforced. But no case, we believe, brings within the judicial function the function of ordering a strike—or anything else—to be terminated in the absence of adjudication that the defendant has failed to do what the court finds he should have done, or has otherwise failed to meet some substantive standards.

The Government disputes these propositions by setting forth what it regards as analagous situations. An analysis of the cases actually cited, however, illustrates rather than defeats our argument.

The case cited first (p. 28) and last (p. 37) is *In re Debs*, 158 U. S. 564. We think that *Debs* is discredited. But whether that be so or not, it is clear that this Court in *Debs* sought to justify the injunction issued by the Circuit Court on the basis of the principles we have urged rather than to deny them.

In *Debs*, it was alleged that the defendants created a boycott against the cars of the Pullman Company; that by force and violence they prevented the movement of any Pullman cars and of the trains of the companies that hauled Pullman cars; that they forcibly obstructed, derailed and wrecked engines and trains of the railroad companies; and that "by these and other unlawful means" attempted to obtain control of the entire operations of the companies. 158 U. S. at 568-569. An injunction was issued and violated, and Debs and others were punished for contempt. The case came to the Supreme Court on applications for habeas corpus.

Two questions were thus presented, the Court said (158 U. S. at 577):

> "First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?"

The Court answered both questions in the affirmative. It held, first, that since "Congress . . . has assumed actual control" over interstate commerce and the transportation of the mails, "it follows that the national government may prevent any unlawful and forcible interference therewith." 158 U. S. at 581. Passing to the second question, 158 U. S. at 582, it held that, just as the government had the power

to forcibly abate a nuisance or prevent unlawful conduct, there was also the "right of appeal, in an orderly way, to the courts for a judicial determination." Indeed, said the Court, "it is more to the praise than to the blame of the Government that, instead of determining for itself questions of right and wrong on the part of these petitioners . . . it submitted all those questions to . . . judicial tribunals. . . ." 158 U. S. at 583.

Equally unhelpful to the Government's position, and indeed even acknowledged to be so, are *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. 518 and *Georgetown* v. *Alexandria Bridge Co.*, 12 Pet. 91. The *Sanitary District* case involved a diversion of Lake Michigan waters by the City of Chicago alleged to be in violation of an act of Congress. The issue litigated was whether the diversion was lawful. The *Wheeling Bridge* case involved an injunction against the building of a bridge which was claimed to unlawfully obstruct navigation on the Ohio River. The issue in the *Alexandria Bridge* case was whether an injunction would lie against a nuisance in the light of the fact that such a nuisance was also subject to criminal prosecution.

Nor is the acknowledged power of the federal courts to entertain condemnation proceedings destructive of our argument. This Court, in *Kohl* v. *United States*, 91 U. S. 367, sustained the right of the United States to institute condemnation proceedings, without express statutory provision for a judicial proceeding therefor, on precisely the theory that "the right of eminent domain was always a right at common law. It was not a right in equity, nor was it even the creature of a statute, . . . the suit is an attempt to enforce a legal right." 91 U. S. at 376.

Ullman v. *United States*, 350 U. S. 422, does not advance the argument. The order to testify there was in aid of a judicial proceeding already in progress, and the Court specifically limited its ruling to the provision of the statute ap-

plicable in such cases. 350 U. S. at 431. In any case it may be questioned whether the court, under any provisions of the statute, is creating the duty to testify or merely eliminating an obstruction, the claim of Fifth Amendment privilege, to the general duty to do so.

Equally irrelevant are *Virginian Ry.* v. *System Federation,* 300 U. S. 515, *Marine Transit* v. *Dreyfus,* 284 U. S. 263, or the other similar cases cited by the Government. In all of those cases the law provided a duty and the powers of the judiciary were invoked only to resolve a dispute as to the duty, to enforce it, or to remedy the effects of a prior failure by the defendant to meet the substantive standards established by law. In no case was an injunctive remedy prescribed by Congress for the sake of having an injunction, rather than for the purpose of enforcing an obligation which the defendant could meet without requiring judicial process.

The only case which poses any serious theoretical problem is *Tutun* v. *United States,* 270 U. S. 568. It is possible to construct an argument which reconciles that case with the theory we have urged. In all candor, however, we think that the doctrine of *Tutun* simply should be treated like the charter cases "as exceptional, although within their special field there was no thought to disturb them." *Gully* v. *First National Bank,* 299 U. S. 109, 113-114. As the Court noted in *Tutun,* the federal courts had been engaged in the function of admitting to citizenship since 1795 without question of constitutionality. Words used by Mr. Justice Brandeis in that case should not, we believe, be used by way of analogy to sweep within the ambit of the federal judicial power a tremendous variety of "status" proceedings inconsistent with the views consistently expressed by this Court both before and after *Tutun.* Cf. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 481-483 (dissenting opinion by Mr. Justice Frankfurter). Particularly is this true, we believe, in the light of the absence of any precedent, old or new, for the kind of proceeding which Congress has created

under Section 208. If, to accommodat that proceeding, this Court should hold, as the Government urges at p. 31-32, that so long as the form is judicial, the existence of what this Court has heretofore defined to be a case or controversy is immaterial, there would seem to be no limitation upon the kinds of proceedings arising under federal law, or involving diversity of citizenship, which can be vested in the federal courts.

C—*The Functions Vested in the District Court by Section 208 Do Not Meet the Constitutional Requirements.*

If the principles we have set forth above correctly express the limitation which the Constitution places on the functions which Congress can impose on the Federal judiciary, it plainly follows that Sections 206-210 are unconstitutional. The principles we have urged are not "a mere form of words," as the Government would have it. They are fundamental to our system of government. That this is so is shown by the illustration given by the Government to reinforce its argument. It is our contention, the Governments says, that:

> "§ 208 would have been valid if it provided that the President should first 'order' the strikers back to work and then seek judicial enforcement of the order, but is invalid because a judicial order is sought in the first instance." (Brief in Opposition, p. 36.)

The Government urges, in other words, that we are in error because we have asserted that the federal courts cannot be given the power which the President would have if Section 208 had been written in the manner which the Government suggests. We do make that assertion. But the Government's answer to it shows, we submit, that the statute is unconstitutional rather than the contrary.

Plainly, if Congress had given the President the authority to order strikers back to work, he would have been exercising an executive rather than a judicial function in doing so.

Assuming that the power were validly granted to him the union would be under an obligation to terminate its strike upon the President's order. Its failure to do so could be rectified in the courts but it would be the President, not the courts, which initiated the obligation. It is precisely because Congress sought to vest in the courts a function which properly belongs in either the legislative or the executive branch of the government that we urged that Section 208 is unconstitutional. It is hardly an answer to that argument to assert that if the function given to the judiciary by that section had been given to the executive branch there would be no violation of the Constitution.

This is not a "mere form of words," as the Government says. Quite the contrary. There is a vast difference between a scheme in which the executive merely states an opinion, but the courts actually break a strike, and a scheme in which the President, not the courts, must bear responsibility for making the decision. The vice of this statute is precisely that it vests in the courts, and makes the courts responsible for, decisions which under our system of government should be made by the executive or legislative branches.

There is an equally vast difference between a statute which provides a duty which a union can voluntarily meet and one which requires that a union be haled into court as a defendant, whether or not it has complied with obligations imposed by Congress or the President. This is shown graphically by examining the amendments proposed to the Act in 1949. The Thomas-Lesinski bill (S. 249, 81st Cong., 1st Sess.) expressly provided for a cooling-off period in national emergency situations. It provided, in Sec. 301 for a Presidential proclamation calling upon the parties to refrain from a stoppage, or if one had begun, to resume work and operations. The President was then to appoint a board to investigate into the dispute, and it was provided, in Section 302 (3) that

the parties should continue or resume work until 5 days after that board had reported to the President. It thus defined the duties of the parties, as the present statute does not, and placed the executive duties with the executive.

What was the purpose of those provisions, and the objection to the Taft-Hartley provisions? It was stated succinctly in the Committee report:

> "Impartial authorities in the field of labor relations agreed in their testimony before the committee that an injunction is neither a necessary or desirable method of getting a cooling-off period and that in most cases it merely serves to aggravate the dispute and to delay rather than facilitate a settlement. (See testimony of William H. Davis, February 7, 1949; of William M. Leiserson, February 23, 1949; and of Nathan P. Feinsinger, February 19, 1949.) These authorities unanimously agreed that the Taft-Hartley Act emergency procedures were bad." (Senate Report No. 47, 81st Cong., 1st Sess., p. 36, emphasis added.)

The Thomas-Lesinski bill failed. Congress decided that it wanted an injunction *qua* injunction, rather than a cooling-off period obtained by voluntary acquiescence in a duty defined by the President or by statute. We do not ask this court to reverse that judgment. We do say that it makes clear the Congressional purpose to use the federal courts, not to achieve compliance with a defined standard of conduct, but to throw the force of the community and the judiciary against a lawful strike.

The Government argues, finally, that even if it concedes that we are correct as to the nature of the judicial function, the constitutional standard is met because the strike to be enjoined under Section 208 is "wrongful" because it impinges on the public welfare. (Brief in Opposition, p. 38.) It thus echoes the view of the court below (R. 292-294).

This argument simply will not hold water, whether the "wrongful" nature of the strike is claimed to be forever as

the Government implies, or for 80 days as the court below and the Second Circuit have said.

The Government's theory is the least defensible. It is inconceivable that Congress intended to make strikes affecting the national health or safety unlawful and to reinstate and expand to such an astonishing degree the theory of *In re Debs* 158, U. S. 564. If it had, it surely would not have provided that the injunctive remedy should terminate in 80 days. Equally clearly, it would have provided some alternative method of resolving the underlying economic dispute. A contrary contention, we believe, cannot be drawn from generalized statements of Congressional intention, particularly when they are belied by the specific provisions, not only of Sections 206-210, but also of Section 13 of the Act, 29 U.S.C. Sec. 163, which specifically provides:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

As to the theory that Congress created an implied obligation to terminate or delay a strike for 80 days, we think it is plain from the statute, and we have demonstrated above, that Congress did not so intend and did not in fact so provide. It provided for an 80-day injunction, not an obligation not to strike for 80 days. Termination or delay in a strike, without an injunction, would not satisfy the statutory language or the Congressional intention.

The statute simply cannot be read, as it was by the Court of Appeals for the Second Circuit and the court below as prohibiting strikes of the kind described in § 208 for a period of time. Nor, surely, can it be read as implying a duty not to strike for such a period. In *Pope v. United States*, 323 U. S. 1, the Government could, by paying Pope, satisfy the obligation implied by the Court from the jurisdictional stat-

ute. In *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, the subpoenaed witness could satisfy his obligation by appearing and testifying. In *Ex Parte Siebold*, 100 U. S. 371, the Judges of Election could satisfy their "duty to the National Government" (100 U. S. at 388) by not stuffing ballot boxes. But, under this statute, the required 80-day period of freedom from the effects of a strike can be satisfied only if an injunction is issued.

The alternative theory of the court below (R. 294-296) was that Congress, in effect, reinstated, to a limited degree, the labor injunction as it existed before the Norris-La-Guardia Act, and the labor injunction was historically a "status" judgment. This too is wrong. However egregious the labor injunction has been, it always purported to rectify wrongs and violations of pre-existing rights. It enjoined violence, breach of contract, or tortious interference with advantageous relationships. It rested on rights conferred by statute or common law. It did not declare status not existing before the declaration was made.[17]

Proceeding on this premise, however, the court below then concluded that the judgment required to be exercised by a district court under Section 208 must be regarded as judicial rather than legislative because "if this were not so a substantial portion of the jurisdiction granted to the courts of the United States by Congress would fall within the interdiction of Article III, Section 2 of the Constitution." (R. 293) The Court cited as examples of the kind of judicial actions which would thus be interdicted, orders of the National Labor Relations Board, of the Securities and Exchange Commission and of the Interstate Commerce Commission, among others. The Court of Appeals thus underlined with great precision, the exact nature of the difficulty here. For none of these bodies is a court in the Article III sense. To some extent they do act judiciously in adjudicating exist-

[17] See Frankfurter and Greene, *The Labor Injunction* (1930) 89-90.

ing rights and duties, but to a large extent they do create status and prescribe future conduct on standards such as "public interest, convenience and necessity."

Such functions cannot constitutionally be vested in the Article III courts. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 and cases therein cited. See also *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210. When federal courts are called upon to review such agencies, they are not asked to act as administrative bodies. They are asked only to determine whether the administrative agency complied with its duty under the law and the standards which Congress prescribed. This is the critical distinction pointed out by this Court in *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 275-277. This is also the distinction between review of the action of the Commissioner of Patents, *Morgan* v. *Daniels*, 153 U. S. 120, and the participation by the courts in the statutory proceedings under the patent laws, as in *Butterworth* v. *U. S.*, 112 U. S. 50.

The court below was, indeed, correct in its assumption that the function of the injunction under Section 208 is not to adjudicate existing rights or duties but to create rights or status. It erred when it held that the function of creating a status, of creating rights and duties, can properly be vested in Article III courts under the Constitution.

IV. THE PROCEEDINGS REQUIRED BY SECTION 208 REFLECT THE UNCONSTITUTIONAL NATURE OF THE FUNCTION VESTED IN THE DISTRICT COURTS.

Our argument above was conceptual in nature. We did not attempt to examine the character of the district court proceedings to show how they reflected the non-judicial nature of the function vested in the courts by Section 208. If we look at the question from that angle, however, the essentially non-judicial nature of a Section 208 proceeding quickly becomes apparent. The findings which a district

court is required to make, the matters he must consider in entering his order, and the proceedings he must conduct, are clearly more akin to those normally found in administrative or executive procedures than to the tradition of the judiciary.

A. *The "Findings"*

Under § 208 the district court is required to decide whether the occurrence or continuance of a shutdown "will imperil the national health and safety." He is not to review the findings of the Board of Inquiry or of the President — for they are required to make none — but to make his own.

This finding, while a finding of fact in form, is in actuality a determination beyond judicial competence. In the present case the question of safety turns upon a claimed peril to defense needs. How is a judge, within the confines of an adversary proceeding, to make a genuine judgment of defense requirements and the extent to which they are jeopardized? The information necessary to the judgment cannot be reduced to a record; the understanding necessary to evaluate the information is altogether foreign to the professional capacity of the judge. The judge is in truth required either to echo uncritically the opinion of the executive officers whose affidavits are produced by the government, or, if he would reject their opinion, to be just as uncritical; the judicial tools at his command are not equal to establishing a solid basis for either judicial acceptance or rejection of the executive opinion. To rubberstamp another's opinion, or to reject it without actual capacity for evaluating it, is not to exercise a judicial function.

Defense needs call in the highest degree for judgment in the political realm. To cite but a single instance, peril to national safety cannot be ascertained without also having an informed opinion of the prospect of foreign aggression, its scope, imminence, and effectiveness. These are political questions and their decision is therefore outside the judicial

function. "Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines* v. *Waterman SS Corp.*, 333 U.S. 103, 111.

This case was tried on affidavits. One has but to imagine the nature of the proceedings which would have taken place if the affiants had been placed on the witness stand, subject to cross-examination, to recognize the essentially unjudicial nature of the proceedings. A Congressional committee would, no doubt, find examination of the Secretary of Defense and the Administrator of the National Aeronautics and Space Administration as to the reasons for the delays in the missile and space programs very enlightening. The posture of our defenses and the question of whether the impact upon them of the steel strike is significant compared to the effect of budgetary and other considerations is a proper subject for hearing before the Armed Forces Committee of the Senate. Whether, as Dr. Saulnier has deposed, "small wars" may be invited because a steel strike is not enjoined (R. 195, quoted in the Brief in Opposition, p. 49) is an interesting question but hardly one on which it can be expected that a district judge is competent to rule. To expect a district court to make "findings" on such issues, and to examine those "findings" once made, on the basis of ordinary rules as to evidentiary support, is to apply rules and procedures simply not fitted for the task.

The vice is compounded if, as the Government claims, "national health" embraces economic well-being. How is a judge to know whether the economy can stand 3,000,000

unemployed but that 5,000,000 is intolerable? How is a judge to know whether dislocation of industry dependent on steel has reached a perilous stage? One has but to read the affidavits of economists Saulnier, Keyserling, and Nathan to realize that the courtroom is the least suited forum for resolving the clash of economic opinion and prognosis. To act as if that clash can be reduced to findings of fact and conclusions of law is to mock the judicial function.

Finally, even if all the other factors required to be taken into account could be reduced to justiciable form, there remains the question of prophecy inherent in the findings. The district court must find that the strike, if permitted to continue, will imperil the national health or safety. This statutory standard speaks, necessarily, in terms of the future. Attention must be directed, as the court below said, on "tomorrow's approaching storm." (R. 300). But how many tomorrows? Is it proper to consider the effects on the atomic weapons program relied on by the Government (Brief, p. 13) which will occur only if the strike continues until early 1960, or the predicted "ultimate" effect on unemployment recited by the District Court in its findings (R. 247) which is based on the premise that the strike will go on till the end of December?

Obviously a court, in order to make the requisite finding must predict what will happen if no injunction issues. Surely if the judge were persuaded by the evidence that if the strike were not enjoined it would be settled in three days (cf. R. 41) he could not find that the strike "if permitted to continue . . . will imperil the national health or safety." The district court must, in short, make a determination as to the effect on the nation if the strike is not enjoined and, to do so, he must make a determination as to whether it is likely or unlikely, in that event, that the strike will be settled.

The Government was aware of this necessity in the District Court. It tendered to the District Court (R. 202) and the District Court adopted, a finding stating that, unless

enjoined, "the strike will continue for an indeterminate period" (R. 245). We are not sure what kind of a "finding" this is, other than that the court was unable to determine how long the strike would continue. If it was meant to suggest that the strike would continue indefinitely, it is plainly contradicted by the only evidence on the subject introduced at the trial. (R. 40-41, 56) Concededly that evidence was only an opinion, albeit an informed one, as to the future course of collective bargaining—but that is precisely the kind of opinion which the statute requires the District Court to express as a "finding."

We believe that the Government in this Court has properly evaluated the "finding" which it asked the District Court to make. "The proceeding before the court would be turned into an elaborate guessing game as to what might or might not happen if an injunction were to issue." (Brief in Opposition, p. 53) Not "would be"—"was." And necessarily so, because in the absence of a finding based on such a "gossamer inquiry" (*id.*) it is impossible to find what the effect on the nation will be if the strike is not enjoined. And this is the "finding" which Congress required.

B. *The Order.*

It is clear, and the Court below unanimously concluded, that the court, after it makes the "jurisdictional" finding as to safety and health, has discretion as to whether the strike should be enjoined or not. The existence of discretion is not, of course, incompatible with the judicial function in determining appropriate remedies. The discretion involved here, however, is necessarily of a different character because there are no wrongs to be remedied; the purpose of the proceeding is to settle a labor dispute between the companies and the union, not to rectify any transgressions by either. As the opinions of the court below indicate, resolution of this kind of problem necessarily places the district court in the

position of making a judgment which is wholly legislative or administrative in character.

One further aspect of the order requires comment. Congress surely did not intend that employees be required to work or, more accurately, be forbidden to concertedly refuse to work, while leaving the employer free to establish, or change, the conditions and terms of employment. And so the district judge must, necessarily, make some determination as to what the conditions of employment will be. The Government proposed, in this case, that the court order that the terms and conditions of the agreements which were in effect on June 30, 1959, be the terms and conditions for the period of the injunction (R. 207) and the court did so. (R. 250) The court thus legislated, even by extending the prior agreements, as to the wages, hours and working conditions of the employees, and made a determination on one of the issues involved in the collective bargaining controversy (R. 48-49). *Cf. Boston Printing Pressmen's Union* v. *Potter Press,* 141 F. Supp. 553, *aff'd,* 241 F. 2d 787, *cert. denied,* 355 U. S. 817.

The District Court is not finished legislating. It has specifically reserved two questions, both of which were critical issues in the collective bargaining which preceded the strike. The first question relates to the provision for adjustments in wages for changes in the cost of living. The continuation of this provision was one of the major issues in the negotiations. As stated by counsel for the employers to the District Court "It was the undeviating position of the companies that no cost of living provision should be included in any new contract." (R. 210). Whether such a provision "should be applicable during the period of the injunction" is an issue specifically reserved by the trial court. (R. 236).

Similarly one of the major issues in negotiation was whether any settlement should be retroactive. The union has contended that a provision for retroactivity should ap-

propriately be contained in the court's decree. (R. 36, 160) The District Court has reserved ruling on this question as well as on the cost of living question. (R. 237)

C. *The Procedure.*

The final anomaly in the provisions of Section 208 should have particular significance to all who have participated, as litigants or judges, in the present case. It is the attempt to adapt judicial procedures plainly not fitted for the task to an 80-day injunction. It simply is not possible to proceed in the normal judicial manner in this kind of a case. In most cases brought under § 208 the Government has chosen to proceed *ex parte* by obtaining a temporary restraining order. Then, after the strike is judicially broken, the case is heard on "preliminary" injunction—a preliminary injunction which never becomes final because it must be discharged within 80 days. Unless a stay is granted the 80-day period is over before the judicial process can be completed—as it was in *United States* v. *United Steelworkers of America* (American Locomotive), 202 F. 2d 132 (1953), in which the Second Circuit affirmed the injunctive order on its 79th day. A union can avoid having its strike broken without any hearing only by agreeing, as the union did in this case, that the case be heard on affidavits, with all the deficiencies such procedure entails.

And it can get review only by the most heroic efforts and by depriving the courts, as the Court of Appeals was deprived here, of the kind of briefing, argument and consideration which is essential to the judicial process.

These anomalies, we submit, are objectionable enough in themselves. More importantly, they are symptomatic of the underlying unjudicial nature of the kind of proceeding which Congress has thrust upon the courts in Sections 206-210. In using the injunction, not as a judicial remedy to correct wrongs or preserve rights, but as an integral but

temporary part of an administrative process designed to settle a labor dispute, Congress has attempted to put the courts in a business for which they are not fitted and which is forbidden to them under our Constitution.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Court of Appeals herein should be reversed and the cause dismissed.

Respectfully submitted,

ARTHUR J. GOLDBERG
DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
BERNARD DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.
Attorneys for Petitioner
United Steelworkers of America

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APPENDIX A

THE AVAILABILITY OF SPECIAL STEELS NEEDED FOR MILITARY, AIRCRAFT AND MISSILE PURPOSES

This appendix summarizes information, taken from published sources of which the Court can take judicial notice, as to the availability of special steels which are used for missile and aircraft purposes from plants not currently on strike. The sources used are cited at the appropriate places.

I. Vacuum-Melted Steels

Steel Magazine, a leading trade publication, has compiled and published, on October 26, 1959, a *Metal Selector*, copies of which we have filed with the Clerk of the Court. This document contains a comprehensive listing of alloy steels and other metals, and describes their properties, chemical composition, and typical uses. With respect to vacuum-melted steels, the first group listed (pp. S-3 to S-6), the *Metal Selector* also names the producers of these steels.

"Vacuum-melting techniques are employed in the case of some steels to obtain improved physical and mechanical properties unobtainable in any other way." United States Steel Corp., *The Making, Shaping, and Treating of Steel*, 357 (7th ed. 1957). An examination of the uses of vacuum-melted steel, as described in the *Metal Selector*, will reveal that this type of steel is especially adapted for missile and aircraft purposes, because of its combination of "strength, heat resistance, and workability." (*Metal Selector* S-2) A few of the properties and uses of typical vacuum-melted metals are as follows:

W545: Highly stressed parts in missiles and turbines.

300M: Ultrahigh strength steel pressure vessels, structural parts, airframe components.

AISI 316: High resistance to corrosives affecting other stainless steels; high creep resistance.

Greek Ascoloy: Heat resisting steel for jet engine

compressor blades, turbine discs and auxiliary parts.

Inductovac 18-8B: Atomic energy applications, such as neutron control rods.

AISI 51100: Bearing material, . . . high fatigue strength, low frictional torque. Jet engine bearings.

AISI 347: Crack free core wire for welding and miscellaneous uses. Jet engine parts in cyclical heat zone.

Of the 23 producers of vacuum-melted steel which are named in the *Metal Selector*, only three are involved in this strike: Allegheny Ludlum Steel Corp., Crucible Steel Co., and Republic Steel Corp. These are numbers 1, 6, and 15 in the list. An examination of the vacuum-melted metals and their respective sources will show that the overwhelming majority are not even made by these three companies, and that virtually all which are made by them are also made by some other company or companies. In the few instances in which a particular metal is made only by one or more of these three companies, the *Metal Selector* shows that there are other compositions only slightly different which are made elsewhere and have the same essential properties. And, of course, any company not on strike which has the appropriate furnaces can make the steel normally made only by a struck company, by simply using the ingredients in the ratio given in the *Metal Selector*.

Taking the vacuum-melted metals group by group, the *Metal Selector* shows the following:

Nickel-Base Alloys (p. S-3) — Of these 28 compositions 20 are made exclusively by companies unaffected by the strike, 7 are made by one or two companies on strike, and in each case by from 2 to 9 companies not on strike. In only one case is a particular product made only by a company on strike. This is D-979 steel made by Allegheny Ludlum and used in jet engines, for stresses up to 1600 degrees Fahrenheit. However, other alloys made by non-strike-bound companies, such as Nicrotung, made by West-

inghouse Electric Corporation, Blairsville, Pa., is used for "highly stressed parts at 1500-1800 degrees F."

Iron-Base Alloys (p. S-3, S-4)—Of 28 separate compositions, 9 are made exclusively by companies unaffected by the strike, 15 are made by both struck and non-struck companies. Four compositions are made exclusively at struck plants. AMS 6427, for super-strength structural parts, airframe components, is made by Allegheny Ludlum and Republic, but numerous other companies make ultra-strength steel for aircraft uses. Crucible 56, described as "ultra high-strength material for use up to 1100 degrees F." is made only by Crucible. However, of the several other ultra-strength steels available, at least one has a maximum temperature of 1000 degrees. Crucible 218 is made only by Crucible and Potomac A is made only by Allegheny Ludlum, both on strike. These are "ultra-high strength material for use up to 1000 degrees F." As indicated above, numerous other companies not on strike make steels with the same properties.

Alloy Tool Steels (p. S-4)—Of these 27 separate compositions, 11 are made exclusively by companies not affected by the strike. Twelve are made by both struck plants and non-struck plants, and in each case only one or two struck plants make the particular grade of steel, whereas as many as 10 non-struck plants make the same steel.

Of the 4 compositions made only by plants on strike, one is Ferrovac, a die steel made by Crucible Steel Company, but numerous non-struck companies make other steels with the identical properties. A second composition made only by a struck plant is HTB-3, made by Allegheny Ludlum, for jet engines and other high-temperature applications. Again, non-struck plants make numerous compositions with the identical properties. Third is Rex Super Cut, "a tool steel for high-temperature bearings," made by Crucible, but AISI T-1, for example, made by 8 companies not on strike is also "a tool steel for high-temperature bearings". Fourth

is Teton, "a high compressive strength and abrasion-resistant steel" made by Allegheny Ludlum. Numerous other companies make similar steels, as for example, HTB-1, which has properties of high-temperature bearings for jet engines.

Cobalt Base Alloys (p. S-5)—Two of these 4 separate compositions are made exclusively by companies not on strike, and each of the other two are made by two companies on strike and 4 companies not on strike.

High Temperature Alloys (p. S-5, S-6)—Of these 39 separate compositions, 17 are made exclusively by companies not on strike; 18 both by companies on strike and not on strike; and only 4 exclusively by companies on strike.

Of the four, two are AISI-304 and 305, high-temperature service corrosive-resistance steels made by Allegheny Ludlum and Republic. But numerous other companies make similar steels with similar properties, as for example AISI-310, "high-temperature service under corrosive conditions," which is made by 6 companies not on strike. The third type is a 418 Special, made by Allegheny Ludlum, which is heat resisting steel for jet engine compressor blades. Several other companies not on strike make precisely the same steel under a different trade name. And fourth is Ferrovac 304-B, an atomic energy steel for such things as neutron control rods. But the Universal Cyclops Steel Corporation, which is not on strike, makes not only precisely the same steel, but also another with the same application.

Miscellaneous Alloys (p. S-6)—Twenty-one of these compositions are made by companies which are not defendants in this case. The remaining two are made only by Crucible Steel Corp. One is used principally for electronic tubes—an item which presumably is not in short supply. The other, Ferrovac 42 percent Ni has the same essential properties as Hipernik, which is made by a company not on strike.

2. Other High Alloy Steels

The other special steels listed in the *Metal Selector* are all high alloy steels of various kinds. These steels are made in electric furnaces. See United States Steel Corp., *The Making, Shaping, and Treating of Steel,* 338-39 (7th ed. 1957). The following table, taken from American Iron & Steel Institute, *Annual Capacities of Coke Ovens, Blast Furnaces and Steelmaking Furnaces as of January 1, 1959* (pp. 13-26) shows that companies which are not parties to this action have 35.04 percent of the total electric furnace capacity of the nation. These companies are able to make "the entire range of stainless steels, super-alloy steels for high temperature applications, and high-speed and other alloy tool steels." *The Making, Shaping, and Treating of Steel* at 339.

TABLE I.

ELECTRIC FURNACE STEEL CAPACITY OF STEEL MILLS STILL IN OPERATION

Company	*Electrical Furnace Steel Ingot Capacity (Net Tons)*
ALABAMA	
Kilby Steel Co.	34,020
Porter, H. K., Co., Inc.	
Connors Steel Div.	115,000
Southern Electric Steel Co.	66,000
ARIZONA	
Yuba Consolidated Industries, Inc.	
Western Rolling Mills Div.	60,000
CALIFORNIA	
Armco Steel Corp.	50,000
Southwest Steel Rolling Mills, Inc.	45,000
CONNECTICUT	
Carpenter Steel Co.	
Carpenter Steel of New England, Inc.	84,000

FLORIDA	
Florida Steel Corp.	43,000
GEORGIA	
Atlantic Steel Co.	276,000
ILLINOIS	
Columbia Tool Steel Co.	6,600
Finkl, A., & Sons Co.	33,600
INDIANA	
Borg-Warner Corp.	
Ingersoll Steel Div.	64,000
Joslyn Mfg. & Supply Co.	37,500
KENTUCKY	
Jessop Steel Co.	
Green River Steel Corp.	183,190
MARYLAND	
Eastern Stainless Steel	80,000
MICHIGAN	
Allegheny Ludlum Steel Corp.	3,000
Ford Motor Co.	221,450
MISSISSIPPI	
Mississippi Steel Corp.	45,000
NEW YORK	
Simonds Saw & Steel Co.	21,600
Wickwire Bros., Inc.	32,440
OHIO	
American Compressed Steel Corp.	21,600
Armco Steel Corp.	293,000
Copperweld Steel Co.	660,000
Timken Roller Bearing Co.	700,000
OREGON	
Gilmore Steel & Supply Co., Inc.	
Oregon Steel Mills	150,000

PENNSYLVANIA	
Alco Products, Inc.	2,800
Armco Steel Corp.	74,000
Baldwin-Lima-Hamilton Corp.	
Standard Steel Works Div.	18,790
Carpenter Steel Co.	87,500
Continental Copper & Steel Industries, Inc.	
Braeburn Alloy Steel Div.	20,730
Erie Forge & Steel Corp.	50,000
Firth Sterling Steel Corp.	20,040
General Tire & Rubber Co.	
Byers, A. M., Co.	90,000
Heppenstall Co.	
Midvale-Heppenstall Co.	56,900
Jessop Steel Co.	35,800
Latrobe Steel Co.	24,000
Merritt-Chapman & Scott Corp.	
Milton Steel Div.	90,000
Mesta Machine Co.	
W. Homestead	20,000
National Forge & Ordnance Co.	25,000
Penncoyd Steel & Forge Corp.	15,600
Phoenix Steel Corp.	
Phoenix Steel Plate Div.	40,000
Union Electric Steel Corp.	25,000
Universal-Cyclops Steel Corp.	77,410
Vanadium-Alloys Steel Co.	12,000
Colonial Steel Co. Div.	30,000
TENNESSEE	
Knoxville Iron Co.	38,000
TEXAS	
Cabot, Godfrey L., Inc.	16,200
Cameron Iron Works, Inc.	58,800
LeTourneau, R. G., Inc.	90,000
Texas Steel Co.	132,450

VIRGINIA	
Newport News Shipbuilding & Dry Dock Co.	15,000
Roanoke Electric Steel Corp.	25,000
WASHINGTON	
Isaacson Iron Works, Inc.	102,000
WEST VIRGINIA	
Porter, H. K., Co., Inc.	110,000
TOTAL	4,729,[illegible]

Or 35.04 percent of the 13,495,130 total industry electric furnace steel capacity.

The remaining question is whether these non-struck companies can make these alloy steels in sufficient quantities to satisfy defense needs. The answer is yes, because the quantities which are required are in fact very small. The total amount of steel shipped to the aircraft and guided missiles and satellite industries in 1958 was 62,209 tons, including 16,127 tons of carbon or ordinary steel, 14,941 tons of stainless and heat-resisting steels, and 31,141 tons of other alloy steels. American Iron & Steel Institute, *Charting Steel Progress—A Graphic Facts Book on the Iron and Steel Industry* 42 (1959 ed.). Total steel shipments for the same year amounted to 59,914,433 tons of steel products, including 56,077,092 tons of carbon or ordinary steel, 493,492 tons of stainless and heat-resisting steels, and 3,343,849 tons of other alloy steels. Thus, the aircraft, missile and satellite industries require only a tiny fraction of 35 percent of all alloy steels produced in this country, and therefore require only a tiny fraction of the amount of such steel which the plants now operating are capable of producing.

Almost all companies in the table above have their own rolling facilities. See American Iron & Steel Institute, *Directory of Iron and Steel Works of the United States and Canada* (1957), which lists the steel-making and steel

finishing facilities of every company in the country. If in a particular case the Government would need a particular product which cannot be rolled at one of these plants, it could easily have the rolling done elsewhere, since, as the "Directory" shows, there are scores of companies other than those with electric furnace capacity which have rolling mills and are not on strike.

APPENDIX B

THE KAISER STEEL CORPORATION

On October 26, 1959, the strike at Kaiser Steel Corporation, one of the defendants below, was settled when a new collective bargaining agreement was signed between that company and the United Steelworkers of America. (R. 319-20) The purpose of this appendix is to describe the facilities at Kaiser Steel which were not working when this action was brought, but which are now in operation. All the information is taken from Longenecker, "Kaiser Steel Appropriates $214,000,000 to Expand Its Services to the Growing West," *Blast Furnace and Steel Plant* (August, 1958).

The steel plant of the Kaiser Company at Fontana, California, occupies 1800 acres and employs approximately 8,000 persons. Raw materials come from Kaiser's own properties. Iron ore is mined at Eagle Mountain, 163 miles from Fontana. In 1957, 2,373,613 net tons of ore came from Eagle Mountain. The company, however, purchased 180,640 net tons of ore from other sources. Eighty-three percent (83 percent) of the coal came from the company's Sunnyside mine in Utah, and the Raton Mine in New Mexico. The remaining 17 percent was purchased from other companies. A total of almost 1,900,000 tons of coal was used in 1957. Limestone comes from Cushenberry, California, where the Permanente Cement Company has a quarry some 75 miles from Fontana. Additional limestone is brought in from Nevada.

Coke Works

Processing begins with the coke plant. There are 7 batteries of 45 ovens each, with a combined daily carbonizing capacity of 6,600 tons. In addition to coke, coke oven gas, tar, naphtha, phenol, benzol, toluol, xylol, and ammonia sulphate, or diammonium phosphate is obtained in the Coppers by-products plant. Part of the coke oven gas is used

in the plant's furnaces and the rest is consumed by the Southern California Edison electric power generating station located adjacent to the Kaiser plant.

Blast Furnaces

There are four blast furnaces, the first having been built in 1942 and the fourth in 1958. The total annual pig iron capacity of the four is 1,912,100 tons. Adjacent to the blast furnaces is a sintering plant with two machines, each with a daily production of 1900 tons of sinter.

The Basic Oxygen Plant

Completed only this year, the basic oxygen plant has an annual capacity of 1,440,000 tons of LD steel. There are three 65-ton furnaces.

The Open-Hearth Department

There are 9 open-hearth furnaces, 5 of 185 tons capacity and 4 of 200 tons. Ninety-eight percent (98 percent) of the heats are carbon and 2 percent are low-alloy.

Soaking Pits

Seventeen batteries with an annual capacity of 2,933,000 tons.

Hot Rolling Mills

1. The Slabbing Mill.

This universal reversing mill was completed in 1958. It rolls slabs from 2½ in.-7 in. thick, from 20 in.-72 in. wide, and from 6 feet to 22 feet long, from a 40,000-pound 23 in. x 78 in. x 82 in. ingot.

2. The Blooming Mill.

A 2-high, 46 in. mill stand having 38 in. diameter rolls handling ingots from 23 in.-25 in. minimum and 30 in.-56 in. maximum, rolling them into slabs 4 in.-10 in. thick, up to 36 in. wide and 60 in.-216 in. long, or into blooms 5 in.

x 5 in. to 8 in. x 17 in., or beam blanks for 8 in. H-beams, 10 in.-wide flange beams, or I-beams or channels over 12 in.-20 in.

3. The Plate Mill.

Operated in conjunction with 3 slab re-heating furnaces and an edger with 44 in-diameter, 30 in. long rolls. The plate proper consists of 2 hot rolling mills, a 2-high mill which follows the edger, and then a 4-high mill. Slabs partially reduced on the 2-high mill are cross-rolled or straight away finished on the 4-high mill. The 4-high mill has 38 in.-diameter, 148 in.-long work rolls. The 4-high mill is followed by a retractable light leveller. Plate, after leaving the 4-high hot rolling mill, is transferred to leveling and shearing operations.

4. The Structural Mill.

This consists of 3 hot mills, a roughing, an intermediate, and a finishing stand. The roughing and intermediate stands are 3-high, and the finishing stand is 2-high. The structural mill is operated in conjunction with the re-heating furnace, straighteners, shearers, and the like.

5. Merchant Bar Mill.

Produces round, square, and flat steel bars, as well as small structural shapes There are three merchant bar mill stands.

6. The Skelp Mill.

The skelp mill is operated in conjunction with the merchant bar mill. It has 10 horizontal and 2 vertical stands.

7. The Electric Weld Pipe Mill.

Pipe from 4½ in. to 12¾ in. in diameter, with a wall thickness of .188-.500 in. can be produced from skelp. The mill forms, welds, and straightens the pipe.

8. Continuous Weld Pipe Mill.

Pipe from ½ in.-4 in. in diameter, wall thickness of from .106 in.-.318 in., is rolled on a Fretz-Moon type mill consisting of 13 stands.

9. The Hot Strip Mill.

This is operated in conjunction with three continuous slab furnaces. The hot strip mill consists of 4 separate hot rolling mill operations:

a. The preheated slabs first go through the scale-breaker;
b. They then go through a 136 in. broadside mill;
c. Then through four 89 in. roughing stands;
d. Finally, they enter a 6-stand finishing mill located almost half a mile from the furnaces.

10. Strip Mill Finishing Department.

This contains a 2-high skinpass mill, together with levelers; a trimming line; a shearing line; a slitting line; a squaring shear; and finally, a shearing and leveling line.

11. Cold Reduction Mill.

This consists of 5 4-high tandem stands.

12. Other Strip Mill Auxiliary Equipment.

There is an electrolytic cleaning line; tinplate mill annealing furnaces; a continuous cleaning and annealing line; two temper rolling mills; and various coil preparation units.

The plant has its own electric power generators. Its maintenance department has its own foundry, forge, and weld shop, roll shop, and the like.

APPENDIX C

AMOUNTS OF COAL USED FOR HEALTH AND SAFETY IN 1948 AND 1950

The following table, based on United States Department of the Interior, Bureau of Mines, *Mineral Industry Surveys—Bituminous Coal and Lignite in 1958* (Released Sept. 9, 1959) shows the distribution of coal and lignite in 1948 and 1950, the years in which coal strikes were enjoined under the Taft-Hartley Act.

Consumption of Bituminous Coal and Lignite, 1948 and 1950
(Net Tons)

	1948		1950	
Consumer	*Amount*	*Percent of Total*	*Amount*	*Percent of Total*
Electric Power Utilities	95,620,000	18.4	88,262,000	19.4
Retail Deliveries	86,794,000	16.7	84,422,000	18.6
Railroads (Class I)	94,838,000	18.2	60,969,000	13.4
Coke Plants				
Beehive	10,322,000	2.0	9,088,000	2.0
Ovens	96,984,000	18.7	94,757,000	20.9
Steel and Rolling Mills	14,193,000	2.7	10,877,000	2.4
Cement Mills	8,546,000	1.6	7,923,000	1.7
Other Mfg. and Mining Industries	110,060,000	21.2	95,862,000	21.1
Bunker, Foreign and Lake Vessel	2,552,000	0.5	2,042,000	0.5
TOTAL OF CLASSES SHOWN	519,909,000		454,202,000	

This table shows that in 1948 and 1950 more than 50 percent of the coal consumed related to the national health and safety. Of the 519,909,000 tons of bituminous coal and lignite consumed in 1948, 95,620,000, or 18.4 percent, were used by electric power utilities; 94,838,000, or 18.2 percent, were used by Class I railroads; and 86,794,000, or 16.7 percent, were taken by retail deliveries, which for the most

part means residential heating. In addition to this, large quantities of coal were carbonized into coke, thus producing gas, some of which went into city mains. Coke was also used for residential heating. Therefore, in the year 1948 more than 277,252,000 tons, or over 53.3 percent, of total consumption of coal and lignite was used for purposes necessary to the national health or safety. Of course, additional amounts would be included under other categories. Other manufacturing and mining industries, for example, would include munitions and armaments factories, so this figure of 53.3 percent understates the amount.

For 1950, the totals are: Electric power utilities, 88,262,000 tons, or 19.4 percent of total consumption of bituminous coal and lignite; Class I railroads, 60,969,000 tons, or 13.4 percent of total consumption; retail deliveries, 84,422,000 tons, or 18.6 percent of total consumption; or a grand total of 233,653,000 tons, or 51.4 percent plus the considerable quantity of coal which, carbonized into coke, was used to produce gas for city mains and residential heating.